Supreme Court, U.S.
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In The

Supreme Court of the United States

UNISYS CORPORATION,

Petitioner,

v.

HARLEY J. ADAIR, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit erred in holding, in conflict with decisions of other circuits, that ERISA imposes an affirmative obligation on a plan administrator to advise plan participants that their benefits can be modified or terminated, when that information has already been communicated in a summary plan description and other plan documents.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Unisys Corporation, a publicly held company. Petitioner does not have a parent company and no publicly held company owns 10% or more of Petitioner's stock.

Respondents are Ernestine DiLoreto, Dennis Gallagher, Francis Walnut, Helen Peterman, Mary Castorani, Henry Geneva, Ruth Stringer, Howard Hansell, Thomas Yeager, Elihu Ginsberg, Vernon Horshaw, Theodore Botzum, Eugene Paul Endress, and Robert Schieman.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Unisys Corporation ("Unisys") respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-46) is reported at 579 F.3d 220. The opinion of the district court adopting in part and modifying in part the magistrate judge's report and recommendation (App., *infra*, 82-236) is unreported.

JURISDICTION

The court of appeals filed its opinion on September 2, 2009. A timely petition for rehearing and rehearing en banc was denied on October 2, 2009. App. 238. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104(a)(1), provides in pertinent part:

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

STATEMENT

This case is an optimal vehicle for resolving an important question that has divided the lower courts: Whether ERISA imposes an affirmative obligation on a plan administrator to advise plan participants that their benefits can be modified or terminated, when that information has already been communicated in a summary plan description and other plan documents. By requiring a plan administrator to repeat what was previously disclosed in a summary plan description whenever plan participants are faced with benefit-related decisions, the court of appeals' holding undermines ERISA's "elaborate scheme" for communicating information about plan benefits to participants and beneficiaries, "a scheme that is built around reliance on the face of written plan documents." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995). This Court's review is necessary to resolve a conflict that exists among the circuits and to eliminate the confusion regarding the scope of a plan administrator's fiduciary duty to disclose information to plan participants.

1. In September 1986, Burroughs Corporation and Sperry Corporation merged to form Unisys Corporation. Before the merger, Burroughs provided its retiring employees with medical coverage at little or no cost to the retiree. After the merger, retirees who previously worked for Burroughs received medical benefits under the Burroughs Medical Plan, and retirees who previously worked for Sperry received medical benefits under the Sperry Medical

Plan. Unisys also started its own plan for employees who retired after April 1, 1989.

Respondents are former Burroughs employees who retired from Unisys between January 1, 1987 and April 1, 1989. Third Cir. Joint Appendix ("JA") 139. For at least four years prior to and during that period, Unisys and its predecessor, Burroughs, repeatedly advised employees and retirees—including respondents—that retiree medical benefits could be modified or terminated at any time. These reservations of rights were set forth in summary plan descriptions and other written communications, such as brochures, annual benefits statements, summaries of material modifications, and COBRA enrollment forms, that were provided to respondents and other plan participants.

2. On October 30, 1992, Unisys announced that, pursuant to its reserved right to modify or terminate retiree medical benefits, it was terminating the Burroughs, Sperry and Unisys plans, and replacing them with a new consolidated plan effective January 1, 1993. Under the new plan, respondents were responsible for increasing levels of premium contributions until January 1, 1996, after which time they were required to pay the full cost of their coverage. JA 16.

3. Multiple lawsuits followed, in which the plaintiffs asserted three types of ERISA claims: (1) claims for breach of the terms of the underlying benefit plans ("contractual vesting"); (2) estoppel

claims; and (3) breach of fiduciary duty claims. The district court certified three separate classes consisting of approximately 21,000 Burroughs, Sperry, and Unisys retirees. In a prior opinion, the court of appeals affirmed the grant of summary judgment in favor of Unisys on the contractual vesting claims and the estoppel claims of the Burroughs class (which included respondents), reasoning that the reservation of rights provision in the Burroughs summary plan description was clear and unambiguous. *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, No. 94-1912, slip op. (3d Cir. June 28, 1995). The court of appeals held that the Burroughs retirees were not entitled to vested medical benefits, that the summary plan description adequately disclosed the company's reserved right to modify or terminate the benefits, and that Unisys had the right to terminate the Burroughs Medical Plan. *Ibid.*

The Burroughs breach of fiduciary duty claims followed a lengthier path. After initially dismissing these claims, the district court reinstated them in light of an intervening decision by the Third Circuit. *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, MDL No. 969, 1996 WL 455968 (E.D. Pa. Aug. 13, 1996). After another trip to the court of appeals, see *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 242 F.3d 497 (3d Cir.), *cert. denied*, 534 U.S. 1018 (2001), the case was decertified as a class action by the district court, which held that each element of the breach of fiduciary duty claims would require individualized proof. *In re Unisys Corp. Retiree Med.*

Benefits ERISA Litig., MDL No. 969, 2003 WL 252106 (E.D. Pa. Feb. 4, 2003).

4. After the class was decertified, approximately 900 former Burroughs and Unisys class members filed five separate actions asserting breach of fiduciary duty claims against Unisys in its role as plan administrator. The parties agreed to sever respondents' claims, which were tried before a magistrate judge in October 2005.

On September 29, 2006, the magistrate judge issued a report and recommendation determining that, despite the clear reservation of rights language in the summary plan descriptions and other written communications, twelve of the fourteen respondents had proven a breach of fiduciary duty. App. 82. There was no finding that Unisys promised respondents vested or guaranteed retiree medical benefits, or assured them that their benefits could not be changed. Nor was there a finding that any respondent had asked or expressed confusion about whether retiree medical benefits were subject to change. Nonetheless, the magistrate judge concluded that because company representatives did not also qualify their accurate oral descriptions of the cost and duration of retiree medical benefits with a warning that the benefits could be modified or terminated, these statements constituted both an "affirmative misrepresentation" and a "failure to disclose" material information in violation of ERISA. App. 191-209.

Having concluded that Unisys breached its fiduciary duty to twelve of the fourteen respondents, the magistrate judge recommended that the district court enter an equitable decree restoring the Burroughs Medical Plan as it existed prior to its lawful termination or requiring Unisys to create a new plan with identical provisions. The plan was then to be "reformed" to eliminate Unisys' right to modify or terminate respondents' retiree medical benefits. App. 226-35.

Both parties submitted objections to the magistrate judge's report and recommendation. On July 16, 2007, the district court entered a memorandum and order adopting in part and modifying in part the magistrate judge's report and recommendation. App. 47-79. The court adopted all of the magistrate judge's factual findings, as well as his legal conclusion that Unisys breached its fiduciary duties to twelve of the fourteen respondents. *Id.* at 79. The court also approved the remedies recommended by the magistrate judge in all but one respect. Instead of ordering the reformation of the plan to remove Unisys' valid right to reduce or terminate benefits following the plan's restoration, the district court enjoined Unisys from terminating the plan or from amending the plan to require respondents to pay premiums for their medical coverage. *Id.* at 70. Thus, the district court effectively awarded respondents vested benefits under a plan that the court of appeals had previously held was properly terminated and did not provide

vested benefits, thereby overriding Unisys' judicially-recognized right to terminate the plan.

5. The court of appeals affirmed. App. 45. Although acknowledging that each oral statement to respondents about the cost and duration of benefits "was not in and of itself false," the court of appeals held that the statements constituted misrepresentations because they "created the impression that the retirees would enjoy these benefits for the remainder of their lifetimes without the possibility of change." *Id.* at 22. What made Unisys' statements misleading, the court of appeals reasoned, was the failure to qualify the accurate description of the cost and duration of benefits with a warning that the benefits could be amended or terminated at any point in the future. *Id.* at 22-23. "In essence, by failing to qualify its statements, Unisys placed a period where it should have placed a comma in the course of explaining retiree medical benefits to these plaintiffs and, in doing so, misrepresented the cost and duration of the benefits." *Id.* at 22.

The court of appeals rejected Unisys' argument that it had satisfied a duty of disclosure to respondents by repeatedly communicating its reservation of rights in summary plan descriptions and other written communications. App. 24-25. Recognizing that the reservation of rights clause was "unambiguous," the court of appeals nonetheless held that Unisys breached its fiduciary duty by not repeating

this information when it was counseling its employees on their retirement decisions. *Id.* at 24.

REASONS FOR GRANTING THE WRIT

ERISA is designed to foster national, uniform standards that create predictability for employers, fiduciaries, and employees alike. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987). This Court's review is needed to restore that uniformity by resolving a split among the circuits concerning the scope of a plan administrator's duty to disclose information to plan participants. The Third and Ninth Circuits have held that a plan administrator has an affirmative duty to inform participants of material terms of a benefit plan even though that information has already been communicated in writing to participants in a summary plan description. By contrast, the Fifth, Sixth, Seventh, and Eleventh Circuits have ruled that there is no duty to repeat what has already been disclosed in a summary plan description. This conflict among the circuits destroys the uniformity the statute seeks to promote and subjects plan administrators in different circuits to different standards of fiduciary disclosure. The Court's review is needed now to resolve the conflict and provide guidance on an issue of national importance.

The Court's review is further warranted because the Third Circuit's decision conflicts with this Court's

decision in *Curtiss-Wright*, and provides the Court with an opportunity to address a question it left open in its decision in *Varity Corp.* v. *Howe*, 516 U.S. 489, 506 (1996): "[W]hether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries."

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A PLAN ADMINISTRATOR HAS AN AFFIRMATIVE DUTY UNDER ERISA TO ADVISE PLAN PARTICIPANTS OF INFORMATION THAT HAS ALREADY BEEN DISCLOSED IN A SUMMARY PLAN DESCRIPTION

The court of appeals' decision is representative of a wider rift among the circuits as to whether a plan administrator has an affirmative duty under ERISA to advise plan participants of information that has already been disclosed in a summary plan description. In addition to the Third Circuit, the Ninth Circuit has held that ERISA imposes such an affirmative obligation on plan administrators. See *Chappel* v. *Lab. Corp. of Am.*, 232 F.3d 719 (9th Cir. 2000).

In *Chappel*, a divided panel of the Ninth Circuit held that a plan participant must be allowed to amend her complaint to allege a breach of fiduciary duty based on the plan administrator's failure to bring to her attention an arbitration provision that had previously been disclosed in the summary plan

description. The amendment should have been allowed, the Ninth Circuit concluded, because the plan administrator's reliance on the summary plan description as the sole means to communicate the arbitration provision would, if true, be a breach of fiduciary duty under ERISA. 232 F.3d at 726-27.[1] The court reasoned that "[a] plan administrator knows, or should know, that a claimant may not be aware, when his or her internal appeal is denied, of a mandatory arbitration clause and a time limit for seeking arbitration, even though the clause and its terms are part of the contract for benefits." *Id.* at 726. See also *Shea* v. *Esensten*, 107 F.3d 625, 628 (8th Cir. 1997) (ERISA duty of loyalty requires plan administrator to disclose HMO financial incentives even in the absence of participant inquiry).

The Ninth Circuit's decision in *Chappel* mirrors the Third Circuit's holding here that communicating information in a summary plan description is not sufficient to meet a plan administrator's disclosure obligation under ERISA. The erroneous holdings of

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[1] In dissent, Judge Fernandez took issue with the majority's conclusion that disclosure in the summary plan description is inadequate, pointing out the uncertainty that would result from the majority's decision: "Just how many other parts of the [summary plan description] sections will be found to be similarly insufficient is now unknown. For example, if the plan administrator happens to hear that a person is ill, must the administrator seek the person out and inform him of 'the procedures to be followed in presenting claims for benefits?' " *Id.* at 727 (Fernandez, J., dissenting).

the Third and Ninth Circuits cannot be reconciled with the decisions of the Fifth, Sixth, Seventh, and Eleventh Circuits declining to impose fiduciary liability on materially indistinguishable facts.

In *Sprague* v. *General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc), retirees brought a breach of fiduciary duty claim alleging that General Motors told them that retiree medical insurance coverage "would be paid by GM for life." The written plan documents, including the summary plan description, contained reservation of rights language that put participants on notice of GM's right to change or terminate the health benefits at any time. *Id.* at 394. Despite this disclosure, the retirees alleged that GM's oral communications were not complete because the company did not also simultaneously advise retiring employees that the benefits were subject to modification. When GM subsequently reduced the coverage, the retirees sued claiming GM breached its fiduciary duty. *Ibid.*

The Sixth Circuit rejected the retirees' claims, concluding as a matter of law that GM did not commit a fiduciary breach. *Id.* at 405. GM never told employees that the retiree medical benefits were "fully paid up or vested upon retirement"—a fact also acknowledged by the court of appeals in this case—but merely that the coverage was to be "paid by GM for their lifetime." This statement was "undeniably true under the terms of GM's then-existing plan," the court concluded, and could not form the basis for a fiduciary violation. The court continued:

> GM's failure, if it may be properly called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change.

Id. at 405. Noting there is a "world of difference between the employer's deliberate misleading of employees in *Varity Corp.* and GM's failure to begin every communication to plan participants with a caveat," the court found nothing in GM's conduct to support a breach of fiduciary duty claim. *Ibid.*

The Seventh Circuit reached the same conclusion in *Vallone* v. *CNA Financial Corp.*, 375 F.3d 623 (7th Cir. 2004). In the course of offering an early retirement program, the company allegedly told potential retirees, both orally and in writing, that a monthly health care allowance for retirees would be a "lifetime benefit," but did not tell employees that the benefit could be changed or revoked. *Id.* at 628. However, documents governing the retirement plan, of which the early retirement program was a part, contained reservation of rights clauses that allowed the company to alter or amend its retiree benefit plans. *Id.* at 638. When the company notified retirees that the health care allowance would be terminated, three retirees who had accepted the early retirement program brought suit alleging, among other things, breach of fiduciary duty.

Addressing the retirees' claim that the company breached its fiduciary duty by failing to remind

prospective retirees of the unambiguous reservation of rights clauses in the plan documents, the court held:

> [W]hile there is a duty to provide accurate information under ERISA, negligence in fulfilling that duty is not actionable * * * that is why the employer must have set out to disadvantage or deceive its employees, as in *Varity*, in order for a breach of fiduciary duty to be made out* * * * *Thus, the lack of a specific warning that welfare benefits are terminable would not alone create a breach of fiduciary duty*. There is simply no evidence that Continental set out to deceive its employees by its actions, and the District Court correctly found that the Plaintiffs' claimed breach of fiduciary duty falls under *Frahm*.

Vallone, 375 F.3d at 642 (emphasis added). In *Frahm* v. *Equitable Life Assurance Society*, 137 F.3d 955 (7th Cir. 1998) (Easterbrook, J.), the Seventh Circuit held that oral statements to prospective retirees stressing the availability of "lifetime" benefits did not violate ERISA's duty of loyalty, where the plan and the summary plan description contained reservation of rights clauses "too clear to admit of argument." *Id.* at 957.

Similarly, the Fifth and Eleventh Circuits have both rejected the argument that a plan administrator has a fiduciary duty to advise plan participants of information that has already been disclosed in a summary plan description. In *Barnes v. A.S. Lacy*,

927 F.2d 539 (11th Cir. 1991), the Eleventh Circuit refused to impose such an obligation with respect to an employer's right to amend the terms of its retirement plan. The court reasoned that a summary plan description "is Congress's established method for apprising participants of the items of a particular plan" and that participants should therefore "be said to have constructive knowledge of the Plan language" as set forth in the summary plan description. *Id.* at 543-44. The *Barnes* court relied on the Fifth Circuit's earlier decision in *Schultz v. Metropolitan Life Insurance Co.*, 872 F.2d 676 (5th Cir. 1989), in which the court affirmed the dismissal of a breach of fiduciary duty disclosure claim where the information in question had been published in a "Plan summary." *Id.* at 680.

The decisions of the Third and Ninth Circuits cannot be reconciled with the decisions of the Fifth, Sixth, Seventh, and Eleventh Circuits. Indeed, the Sixth Circuit specifically declined to impose liability on facts virtually identical to those here, and expressly rejected the very disclosure rule adopted by the Third Circuit. The Fifth and Seventh Circuits held that the lack of a specific warning that retiree benefits are subject to change does not establish a breach of fiduciary duty, and the Eleventh Circuit dismissed outright a similar disclosure claim. Had the facts before the court of appeals here been presented to these courts, Unisys would have prevailed.

II. THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF ERISA LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND IS FUNDAMENTALLY AT ODDS WITH THE STATUTORY DISCLOSURE SCHEME ITSELF

The court of appeals' decision embraces an interpretation of ERISA fiduciary duties that cannot be reconciled with the decisions of this Court or the basic tenets of the statute. If left undisturbed, the court of appeals' decision requiring additional individualized disclosures of basic information that already has been disclosed in a summary plan description—and awarding vested medical benefits as the penalty for failing to do so—will have serious implications not only for ERISA plan fiduciaries, but also for participants themselves.[2]

As this Court has made clear, ERISA has "an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is *built around reliance on the face of written plan documents*." *Curtiss-Wright*, 514 U.S. at 83 (emphasis added); 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument."). The

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[2] In their petition for attorneys' fees to the district court, respondents themselves described the court of appeals' ruling in this case as a "landmark case in the field" that established "the framework for trying and deciding claims of this kind."

Court explained in *Curtiss-Wright* that ERISA gives effect to this scheme through a comprehensive set of reporting and disclosure requirements, including ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1), which mandates that "plan administrators periodically furnish beneficiaries with a Summary Plan Description, * * * the purpose being to communicate to beneficiaries the essential information about the plan." 514 U.S. at 83. The Court was reluctant, therefore, to impose an additional disclosure obligation not expressly contemplated by Congress:

> This may not be a foolproof informational scheme, although it is quite thorough. And we do not think that Congress intended it to be supplemented by a faraway provision in another part of the statute* * * *

514 U.S. at 84.

ERISA's express preference for written documents—and in particular a summary plan description—is firmly rooted in common sense, as Judge Easterbrook explained in *Frahm*, 137 F.3d at 959-60. *Frahm* involved allegations that an employer breached its fiduciary duty by telling retiring employees that changes to the medical plan would only apply prospectively while failing to qualify that statement with the caveat that this rule was not cast in stone or legally required. *Id.* at 959. The Seventh Circuit rejected the breach of fiduciary duty claim, with Judge Easterbrook's opinion for the court citing the sound policy reasons that favor written over oral representations:

> Havoc would ensue if plans meant different things for different participants, depending on what someone said to them years earlier. Memory is weak compared to the written word, and there is a substantial risk that participants will not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position* * * * If it is hard now to administer plans that apply to all participants, it is impossible to see how any employer could administer a plan that meant something different to each participant, where the difference was not committed to writing* * * * We do not think § 1104(a)(1)(B) takes back with the left hand the primacy of the written word that ERISA establishes with the right hand.

Id. at 960.

Just last Term, the Court reaffirmed the importance of written plan documents in determining rights under an ERISA plan, unanimously holding in *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009), that a plan administrator had a duty to follow a participant's beneficiary designation prepared in accordance with the plan documents over a contrary waiver contained in a divorce decree. If plan administrators could not rely on the beneficiary designation, the Court observed, they "would be forced 'to examine a multitude of external documents that might purport to affect the dispensation of benefits,' * * * and be drawn into

litigation like this over the meaning and enforceability of purported waivers." *Id.* at 876 (internal citation omitted).

The Third Circuit's decision in this case invites precisely that result, jeopardizing the certainty and predictability that written plan documents are designed to foster. Myriad disputes could arise over whether adequate oral information was provided, and whether the oral disclosures accurately described the provisions of the plan. Worse still, the court of appeals' decision interjects specific content requirements into oral communications between plan administrators and participants, something that ERISA does not purport to do. See *Metro. Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans"). Under the court of appeals' decision, plan administrators are required not only to issue unambiguous written documents meeting statutory and regulatory content requirements, but also to anticipate participant questions and issue oral warnings of any possible future event that might conceivably affect benefits provided under the terms of the plan. There is no statutory basis for requiring such clairvoyance from a plan administrator. See *Fischer* v. *Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) ("ERISA does not impose a 'duty of clairvoyance' on fiduciaries") (quoting *Berlin* v. *Mich. Bell Tel. Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988)).

The impracticality of the Third Circuit's rule becomes apparent when one considers that a typical

medical plan contains numerous exclusions for things like experimental treatments, pre-existing conditions, and out-of-network services. These exclusions are typically described in detail in the written plan documents. But under the court of appeals' decision, a plan administrator answering a participant's questions about key features of the medical plan would be compelled to recite *all* of those exclusions *ad infinitum* solely because they might, like the reservation of rights clauses in this case, limit in the future the medical coverage described by the administrator. ERISA does not require, much less permit, such an absurd result.

If left undisturbed, the Third Circuit's decision threatens to undermine yet another bedrock principle of ERISA: "Employers are free to amend or terminate welfare benefits, *which do not vest absent a showing of clear intent to vest in written plan documents.*" *Vallone*, 375 F.3d at 632 (emphasis added); *Curtiss-Wright*, 514 U.S. at 78; *Am. Fed'n of Grain Millers* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997). In rejecting automatic vesting of welfare plans, Congress recognized the need for flexibility with regard to an employer's right to change medical plans. *Moore* v. *Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). Flexibility, as this Court has observed, is crucial to the continued offering of welfare benefit plans by U.S. employers:

> The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that

> "requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." S. Rep. No. 93-383, p. 51 (1973). Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, "they would err initially on the side of omission."

Inter-Modal Rail Employees Ass'n v. *Atchinson, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) (quoting *Heath* v. *Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)).

By making an employer's binding obligations dependent on the oral statements of its benefits staff rather than written plan documents, the court of appeals' decision exposes employers to unforeseen financial liability, eliminates the flexibility employers would otherwise enjoy to modify benefits, and creates strong disincentives to offering such benefit programs in the first instance. The Third Circuit's ruling may also lead employers to "discontinue giving advice, telling participants to read the documents and draw their own conclusions." *Frahm*, 137 F.3d at 960 (citing *Sprague*, 133 F.3d at 405). As Judge Easterbrook has warned, "That step would protect employers, but it very likely would increase the level of misunderstanding among participants." *Ibid.* The recent healthcare debate underscores the complexities of medical insurance and reinforces the need for

employees to understand the terms of their coverage. In this environment, employers should be encouraged to share information with plan participants without the risk that their statements will give rise to unintended obligations and reduced flexibility.

* * *

The court of appeals has decided an important question of ERISA law in conflict with decisions of other circuits, in conflict with decisions of this Court, and in conflict with the statutory disclosure scheme itself. This Court's review is needed now not only to resolve the conflict and provide certainty and uniformity to plan administrators, but also to ensure that plan participants may continue to receive advice and information from their employers about their retirement plans and benefits.

CONCLUSION

The petition for a writ of certiorari should be granted.

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-3369, 08-3025 and 08-3545

IN RE: UNISYS CORPORATION RETIREE
MEDICAL BENEFITS ERISA LITIGATION

HARLEY J. ADAIR, ET AL.

v.

UNISYS CORPORATION,

Appellant

Nos. 07-3491 and 08-3430

IN RE: UNISYS CORPORATION RETIREE
MEDICAL BENEFITS ERISA LITIGATION

HARLEY J. ADAIR, ET AL.

v.

UNISYS CORPORATION

THEODORE F. BOTZUM; MARY P. CASTORANI;
ERNESTINE DILORETO; EUGENE P. ENDRESS;
DENNIS F. GALLAGHER; HENRY GENEVA;
ELI U. GINSBERG; HOWARD B. HANSELL;
CHERRY L. SAVAGE, Executrix of the
Estate of Vernon Horshaw; HELEN M. PETERMAN;
ROBERT J. SCHIEMAN; RUTH P. STRINGER;
ANNE S. WALNUT; THOMAS W. YEAGER,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 03-cv-03924)
District Judge: Honorable Bruce W. Kauffman

Argued April 22, 2009
Before: SCIRICA, *Chief Judge*, SLOVITER
and FISHER, *Circuit Judges*.

(Filed: September 2, 2009)

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OPINION OF THE COURT

FISHER, *Circuit Judge.*

The plaintiffs in this appeal are fourteen individuals who retired from Unisys Corporation (Unisys) between 1987 and 1989. These individuals were originally employed by Burroughs Corporation (Burroughs) which merged with Sperry Corporation (Sperry) in September 1986 to form Unisys. In 1992, after the plaintiffs had retired, Unisys announced the elimination of its preexisting retiree medical benefits plans and the implementation of a new medical benefits plan effective January 1, 1993. Although this case carries with it a complicated procedural history due to the evolution of the original class actions, which were filed as early as 1992 on behalf of thousands of Burroughs, Sperry, and Unisys retirees,

this immediate appeal stems from a July 16, 2007 decision, following a bench trial, in which the District Court determined that Unisys breached its fiduciary duty to twelve of the fourteen plaintiffs. As a remedy, the District Court ordered that the terminated retiree plan be reinstated for these twelve plaintiffs and enjoined Unisys from making any changes to coverage under that plan. Additionally, in a June 26, 2008 decision, the District Court awarded plaintiffs approximately $2.3 million in attorneys' fees. Unisys challenges the District Court's finding of liability, the relief it ordered, and its award of attorneys' fees. In a cross-appeal, the plaintiffs argue that the District Court erred in denying retrospective monetary relief to fully remedy the violations they suffered and also that the District Court erred in concluding two of the fourteen plaintiffs did not establish detrimental reliance and therefore could not prevail on their claims. For the reasons stated below, we will affirm the District Court in all respects.

I.

Although the factual and procedural history of this extensive litigation have been discussed in a number of previous opinions, we will recount this background information to the extent it is relevant to the instant appeal.[1] In September 1986, Sperry and

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[1] For a more detailed review of the evolution of this litigation, *see In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 58 F.3d 896, 899-901 (3d Cir. 1995) (*Unisys I*); *In re*

(Continued on following page)

Burroughs, two competing computer manufacturers, merged to form Unisys. Prior to the merger, both Sperry and Burroughs provided post-retirement medical coverage to their retired employees at little or no cost to the retirees. After the merger, Unisys continued to provide the pre-merger benefits under a variety of Sperry plans and the Burroughs Medical Plan. Unisys also created its own medical benefits plan, which had different terms and costs than the Burroughs and Sperry plans, for employees who retired after April 1, 1989. In the process of implementing this new plan, Unisys informed employees who were eligible to retire that they could participate in the existing Burroughs or Sperry plans if they retired prior to April 1, 1989, but after that time they would only be eligible to participate in the new Unisys plan. The fourteen individual plaintiffs in the present appeal were originally Burroughs employees and retired from Unisys between December 1986 and April 1, 1989.

On October 30, 1992, Unisys announced that it was terminating the then-existing Burroughs, Sperry, and Unisys plans, and replacing them with a new consolidated plan effective January 1, 1993. Under the new plan, retirees were responsible for increasing levels of premium contribution until January 1, 1996,

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Unisys Corp. Retiree Medical Benefit ERISA Litigation, 57 F.3d 1255, 1257-61 (3d Cir. 1995) (*Unisys II*); and *In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 242 F.3d 497, 499-502 (3d Cir. 2001) (*Unisys III*).

at which point they were required to pay the full cost of coverage. In reaction to the change, multiple lawsuits were filed in various jurisdictions alleging violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, and the Panel on Multidistrict Litigation eventually assigned those cases to Judge Cahn in the District Court for the Eastern District of Pennsylvania.[2]

On June 9, 1993, the District Court approved the parties' stipulation to certify three separate classes consisting of approximately 21,000 Sperry, Burroughs, and Unisys retirees. Each of these classes was further divided into "regular" retirees and "early" retirees. The class members in each of the six subclasses asserted three separate claims: breach of contract, equitable estoppel, and breach of fiduciary duty.

On October 13, 1993, the District Court granted summary judgment in favor of Unisys on the estoppel and breach of fiduciary duty claims of the Sperry, Burroughs, and Unisys regular retirees, as well as the breach of contract claims of the Burroughs and Unisys regular retirees. *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 837 F. Supp. 670 (E.D. Pa. 1993). The District Court granted Unisys summary judgment on the breach of contract claims

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[2] Although this litigation was originally before Judge Edward N. Cahn, on January 5, 1999, Judge Bruce W. Kauffman was appointed to preside over all of the related matters following Judge Cahn's retirement.

of the Burroughs and Unisys regular retirees because the "summary plan descriptions contain uncontradicted and unambiguous reservation of rights language." *Id.* at 681. The District Court granted summary judgment on the breach of fiduciary duty claims of all of the retirees because the "alleged oral misrepresentations about the terms of the plans by agents of Unisys and its successors, in their capacity as plan administrators, do not constitute breaches of their fiduciary duty." *Id.* And lastly, the District Court granted summary judgment in favor of Unisys on all of the estoppel claims because the plaintiffs "failed to demonstrate that they relied to their detriment on oral and written representations of the plan administrators." *Id.* As a result of this decision, only the breach of contract claims of the Sperry regular retirees and all claims of all early retirees remained viable.

Thereafter, the District Court conducted a seven-day bench trial on the remaining claims. Following trial, but before closing arguments, the Sperry and Burroughs early retirees reached a settlement with Unisys; however, the claims of the Unisys early retirees and the breach of contract claims of the Sperry regular retirees remained viable. On June 23, 1994, the District Court entered judgment in favor of Unisys on all of these remaining claims. *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, No. MDL 969, 1994 WL 284079 (E.D. Pa. June 23, 1994). However, the District Court also granted the Sperry retirees' motion for reconsideration of their breach of

fiduciary duty claim in light of the decision in *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund,* 12 F.3d 1292, 1294 (3d Cir. 1993), rendered during the pendency of the litigation, in which this Court held that a direct action for breach of fiduciary duty exists in the "other appropriate equitable relief" clause of ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B). The District Court explained that "based on the evidence and the law in this circuit, it seems possible that at least some plaintiffs will be able to sustain a [breach of fiduciary duty] claim." *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 1994 WL 284079, at *27. The District Court certified this portion of its decision for immediate interlocutory appeal. The plaintiffs also appealed all of the District Court's summary judgment rulings with the exception of the breach of fiduciary duty claims of the Burroughs and Unisys regular retirees (which were being held in abeyance by the District Court).

On June 28, 1995, in separate opinions, our Court affirmed the District Court in all respects. *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896 (3d Cir. 1995) (*Unisys I*) (affirming grant of summary judgment on breach of contract and equitable estoppel claims); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995) (*Unisys II*) (affirming reinstatement of breach of fiduciary duty claims). Accordingly, the Sperry regular retiree breach of fiduciary duty claims were remanded for adjudication. On August 13, 1996, the District Court also reinstated the breach of fiduciary

duty claims of the Burroughs and Unisys regular retirees. *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, No. MDL 969, 1996 WL 455968 (E.D. Pa. Aug. 13, 1996). These breach of fiduciary duty claims of the Sperry, Burroughs, and Unisys regular retirees were the only claims that remained from the original class action litigation.

On March 10, 1997, the District Court granted summary judgment in favor of Unisys on the breach of fiduciary duty claims of over 14,000 retirees after it concluded that "the statute of limitations bars the claims of many of the retirees, and that many of the retirees cannot demonstrate the resulting harm required to maintain a breach of fiduciary duty claim." *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 957 F. Supp. 628, 646 (E.D. Pa. 1997). But four years later, on March 9, 2001, our Court reversed this summary judgment ruling and reinstated the breach of fiduciary duty claims of these individuals for two reasons. *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 242 F.3d 497 (3d Cir. 2001) (*Unisys III*). First, we interpreted ERISA's statute of limitations for breach of fiduciary duty claims and concluded that the "summary judgment entered by the District Court was overbroad and must be reversed." *Id.* at 507. Second, we rejected the "District Court's view that *Unisys II*, as a matter of law, limits recovery on the breach of fiduciary duty claims to claims based on voluntary decisions to retire." *Id.* at 508.

After this decision, the parties agreed to settle all of the remaining Sperry regular retiree breach of fiduciary duty claims. As a result, the only remaining claims were those of the approximately 10,000 Burroughs and Unisys regular retirees for breach of fiduciary duty. On February 4, 2003, the District Court granted Unisys' motion to decertify the Burroughs and Unisys regular retiree subclasses because of the need to make individual factual determinations in the adjudication of the claims, and thereafter five separate multi-plaintiff breach of fiduciary duty actions were filed against Unisys by approximately 900 of these former class members. *In re Unisys Corp. Retiree Med. Benefits Litig.*, No. MDL 969, 2003 WL 252106 (E.D. Pa. Feb. 4, 2003).

The claims of the Burroughs regular retirees who continued in the litigation were filed together under the caption of *Adair, et al. v. Unisys Corp.* On July 15, 2005, after more than ten years of developments in the litigation, the parties agreed to sever from the *Adair* complaint the breach of fiduciary duty claims of fourteen individuals, namely the plaintiffs who are currently before this Court, so they could proceed to trial before Magistrate Judge Thomas J. Rueter. They also stipulated that the District Court would review all findings of fact for clear error.

From October 17 to October 26, 2005, Magistrate Judge Rueter presided over a bench trial on these claims and, on September 29, 2006, he issued a Report and Recommendation, concluding that twelve of the fourteen plaintiffs had proven that Unisys

breached its fiduciary duty to them as a result of the company's affirmative misrepresentations and inadequate disclosure of certain information about the retirees' medical benefits plan. *In re Unisys Corp. Retiree Med. Benefits Erisa Litig.*, No. MDL 969, 2006 WL 2822261, at *58 (E.D. Pa. Sept. 29, 2006) (Magistrate Report). The Magistrate Judge recommended that the District Court enter an equitable decree restoring the Burroughs Medical Plan for the twelve retirees and reforming the plan to preclude any right to terminate or modify their benefits. *Id.* at *65.

On July 16, 2007, the District Court issued a decision adopting in part and modifying in part the Magistrate Judge's Report and Recommendation.[3] *In re Unisys Corp. Retiree Med. Benefits Erisa Litig.*, No. MDL 969, 2007 WL 2071876 (E.D. Pa. July 16, 2007) (District Court Opinion). The District Court adopted all of the Magistrate Judge's factual findings and the legal conclusion that Unisys breached its fiduciary duty to twelve of the plaintiffs. *Id.* at *3, *9. The District Court adopted the Magistrate Judge's recommendation to restore the Burroughs Medical Plan, but instead of ordering the reformation of the plan, it enjoined Unisys from amending or terminating the plan as to the twelve retirees, thus requiring Unisys to continue to pay the premiums for their medical

[3] Although the decision was filed on July 16, 2007, the corresponding order, from which both parties appeal, was not entered on the docket until July 18, 2007.

coverage. *Id.* at *10. The District Court also denied the plaintiffs' request for monetary damages under a claim for restitution. *Id.* at *11. Lastly, on June 26, 2008, the District Court awarded plaintiffs $2,266,357.92 in attorneys' fees and $97,779.98 for litigation expenses. *In re Unisys Corp. Retiree Med. Benefits Erisa Litig.*, No. MDL 969, 2008 WL 2600364 (E.D. Pa. June 26, 2008) (Fee Opinion). Unisys timely appealed the District Court's orders and the plaintiffs cross-appealed.[4]

II.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1), and we have jurisdiction to review its orders pursuant to 28 U.S.C. § 1291. "In an appeal from an ERISA bench trial, we review findings of fact for clear error but have plenary review over the District Court's conclusions of law." *Vitale v. Latrobe Area Hosp.*, 420 F.3d 278, 281 (3d Cir. 2005). "Determining what remedies are available under a statute is a question of statutory interpretation that requires de novo review. Therefore, we review de novo the District Court's grant of an injunction and its denial of restitution" and other forms of relief. *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 305 (3d Cir. 2008)

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[4] In September 2008, Unisys reached an agreement with the remaining Burroughs plaintiffs to settle their breach of fiduciary duty claims.

(citation omitted). "An award of . . . attorneys' fees to a prevailing plaintiff in an ERISA case is within the discretion of the district court and may only be reversed for abuse of discretion." *Hahnemann Univ. Hosp. v. All Shore, Inc.*, 514 F.3d 300, 305 (3d Cir. 2008) (internal quotation marks omitted). To that end, "[w]e review the District Court's factual determinations . . . for clear error," and "[w]e exercise plenary review over the legal standards employed by the District Court used in calculating the award." *Id.* (internal quotation marks omitted).

III.

A. Breach of Fiduciary Duty Claims

Unisys challenges the District Court's conclusion that Unisys breached its fiduciary duty to twelve of the fourteen plaintiffs. ERISA § 404 provides:

> "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man

> acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;"

29 U.S.C. § 1104(a)(1). We have explained that "[a]lthough the statute articulates a number of fiduciary duties, it is not exhaustive. Rather, Congress relied upon the common law of trusts to 'define the general scope of [trustees' and other fiduciaries'] authority and responsibility.'" *Bixler*, 12 F.3d at 1299 (quoting *Cent. States Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)); *see In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (noting that ERISA § 404 "in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts" (internal quotation marks omitted)). Accordingly, an ERISA "fiduciary may not, in the performance of [its] duties, 'materially mislead those to whom the duties of loyalty and prudence are owed.'" *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir. 2000) (quoting *Unisys II*, 57 F.3d at 1261). This responsibility encompasses "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Bixler*, 12 F.3d at 1300; *see Unisys II*, 57 F.3d at 1264 (explaining the duty "not to misinform employees" through either "misrepresentations" or "incomplete, inconsistent or contradictory disclosures"). In short, "when a fiduciary speaks, it must speak truthfully, and when it communicates with plan participants

and beneficiaries it must convey complete and accurate information that is material to their circumstance." *In re Unisys Sav. Plan Litig.*, 74 F.3d at 442 (internal quotation marks, citations, and brackets omitted).

Thus, as is the case in the present appeal, a breach of fiduciary duty claim may be premised on either a misrepresentation or an omission. To establish such a breach, a plaintiff must demonstrate that: (1) the defendant was "acting in a fiduciary capacity"; (2) the defendant made "affirmative misrepresentations or failed to adequately inform plan participants and beneficiaries"; (3) the misrepresentation or inadequate disclosure was material; and (4) the plaintiff detrimentally relied on the misrepresentation or inadequate disclosure. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 148 (3d Cir. 1999); *accord Burstein v. Ret. Account Plan for Employees of Allegheny Health, Educ. & Research Found.*, 334 F.3d 365, 384 (3d Cir. 2003) (discussing the test for misrepresentations); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3d Cir. 2001) (same).

As for the first element, "ERISA . . . defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Accordingly, "[f]iduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions." *Hozier v.*

Midwest Fasteners, Inc., 908 F.2d 1155, 1158 (3d Cir. 1990). Accordingly, "a person is a fiduciary with respect to a plan only to the extent that he has any discretionary authority or discretionary responsibility in the administration of such plan." *Varity Corp. v. Howe*, 516 U.S. 489, 527 (1996) (internal quotation marks omitted). "A plan administrator . . . acts as a fiduciary when explaining plan benefits and business decisions about plan benefits to its employees." *Adams*, 204 F.3d at 492. However, "[t]he amendment of an ERISA plan is not a fiduciary act governed by ERISA." *Leuthner v. Blue Cross & Blue Shield*, 454 F.3d 120, 127 (3d Cir. 2006).

The second element, a misrepresentation or inadequate disclosure, is best understood when viewed in conjunction with the third element, which requires that the misrepresentation or omission be material. "A misleading statement or omission by a fiduciary" is material if "'there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision,'" *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 452 (3d Cir. 2000) (quoting *Unisys II*, 57 F.3d at 1264), or "a harmful decision regarding benefits," *Daniels*, 263 F.3d at 76. Determining whether a misrepresentation or inadequate disclosure bears a substantial likelihood of misleading a reasonable employee may involve examining whether the "fiduciary, as an objective matter, knew or should have known that a beneficiary would be confused" by the statement or omission. *Burstein*, 334 F.3d at 386

n.31; *see also Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1182 (3d Cir. 1996) (describing omitted information as material if it is "known to the fiduciary but unknown to the beneficiary" and necessary for the beneficiary to "know for its own protection"). Thus, while showing that the fiduciary "had actual knowledge that a particular employee was about to be misled" is not required to satisfy this element, establishing a fiduciary's liability as a result of inadequately disclosed information may involve an inquiry into "the employer's knowledge of an employee's knowledge and understanding," *Daniels*, 263 F.3d at 76, in order to determine if the employer was aware of the confusion generated by its silence.

Finally, although we have at times described the fourth element as "resulting harm" to the plaintiff, *Unisys II*, 57 F.3d at 1265, we have since clarified that this element requires a showing of detrimental reliance by the plaintiff. *See Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 571 (3d Cir. 2006). Notably, detrimental reliance is not limited to the retirement decision alone; rather it may encompass decisions to decline other employment opportunities, to forego the opportunity to purchase supplemental health insurance, or other important financial decisions pertaining to retirement. *Unisys III*, 242 F.3d at 508 (rejecting the view that recovery for breach of fiduciary duty claims was limited to "claims based on voluntary decisions to retire"); *cf. Bixler*, 12 F.3d at

1301-03; *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 237 (3d Cir. 1994).

Turning to the instant case, the essence of the plaintiffs' breach of fiduciary duty claims, as summarized by the District Court, is "that Unisys (1) misrepresented that their retiree medical benefits were vested and could not change despite clauses in certain plan documents reserving the right to modify or terminate those benefits, and (2) failed adequately to advise them of that reserved right." District Court Opinion, 2007 WL 2071876, at *1. The District Court concluded:

> "The alleged misrepresentations made by Unisys may not have been technically false, but the factual findings of the Magistrate Judge establish that they were nonetheless misleading. They were misleading because [Unisys] failed to qualify adequately the information it supplied regarding the low cost of the Burroughs plan with an acknowledgment that [Unisys] could modify or terminate the retirees' medical benefits. [Unisys] knew its employees were confused and that this confusion would benefit the company financially."

Id. at *5.

On appeal, Unisys contends that the District Court erred when it concluded that Unisys misrepresented and failed to disclose material information in violation of its fiduciary duty under ERISA, although Unisys also made clear in both its

briefs and at oral argument before this Court that it does not challenge the District Court's factual findings and "does not dispute what Plaintiffs claim they were told or not told about retiree medical benefits." In support of its position, Unisys emphasizes that it satisfied its statutory disclosure obligations by disclosing, in written communications, its right to amend or terminate the Burroughs Medical Plan, and that this Court has previously held that its reservation of rights clauses contained in its summary plan descriptions were unambiguous. Relying on these two points, Unisys argues that its oral communications regarding plan benefits did not "constitute an 'affirmative misrepresentation' or 'failure to disclose' simply because each statement was not coupled with an additional warning that the benefits were subject to change." Citing our decisions in *Leuthner,* 454 F.3d at 129, and *Fischer v. Philadelphia Electric Co.,* 96 F.3d 1533, 1539 (3d Cir. 1996), Unisys also stresses that at the time its oral statements were made, it was not planning to change retiree benefits, so it cannot be found to have breached its fiduciary duty to the plaintiffs. Unisys raises this last argument in the context of the second element, asserting that its oral statements were an accurate reflection of its intent when the statements were made (and therefore did not constitute misrepresentations), and in the context of the third element, asserting that it was not "seriously considering" any changes to the medical benefits plans at the time its statements were made (and

therefore the allegedly undisclosed information was not material).

The plaintiffs, in response, contend that "[t]he district court correctly ruled on the basis of the extensive record that this case does not involve truthful, accurate statements of intention by Unisys, but instead involves statements that were misleading, company knowledge that employees were confused, and exploitation of this confusion to 'benefit the company financially.'" The plaintiffs also maintain that the District Court "correctly concluded that this Court's decisions foreclosed an argument by Unisys that its [summary plan descriptions] and other documents were sufficient to avoid liability."

Based on the applicable legal standards and the factual findings of the Magistrate Judge, which were adopted in their entirety by the District Court, Unisys' arguments must be rejected. With respect to the first element, fiduciary status, the Magistrate Judge found the following:

> "[E]ach of the Trial Plaintiffs have established that [Unisys'] agents communicated with the Trial Plaintiffs about retiree medical benefits and that such [Unisys] employees had apparent, if not actual, authority to make such communications. In addition to the documentation that [Unisys] distributed regarding retiree benefits, each Trial Plaintiff credibly testified that he or she was advised by either a member of the human resources staff or a supervisor about

> the cost and duration of retiree medical benefits. It is apparent from the trial testimony that [Unisys] delegated to the human resources staff and other managers the function of advising employees about benefits."

Magistrate Report, 2006 WL 2822261, at *45. Although Unisys does not appear to contest this element on appeal, we conclude in any event that the Magistrate Judge's determination is legally sound, as we have stated that an employer "acts as a fiduciary when explaining plan benefits and business decisions about plan benefits to its employees," *Adams*, 204 F.3d at 492.

With respect to the second element, the Magistrate Judge concluded that the facts supported finding that Unisys both misrepresented and inadequately disclosed information regarding retirement benefits. As to the former, the Magistrate Judge stated that it

> "finds credible the testimony of each of the Trial Plaintiffs that [Unisys] misrepresented the cost and duration of retiree medical benefits under the Burroughs Plan by advising each of them that he or she would have free or low-cost medical benefits throughout retirement or for life.
>
> * * *
>
> In determining whether to retire, [Unisys] counseled each Trial Plaintiff, either individually or as part of a group meeting,

> about the cost and duration of retiree medical benefits, representing that the benefits would cost a retiree $20 per month until age sixty-five, after which time there would be no cost to the retiree."

Magistrate Report, 2006 WL 2822261, at *47-48. The Magistrate Judge was correct to conclude that these communications amounted to misrepresentations. Although the statement that "benefits would cost a retiree $20 per month until age sixty-five, after which time there would be no cost to the retiree" was not in and of itself false, it was nevertheless a misrepresentation because it created the impression that the retirees would enjoy these benefits for the remainder of their lifetimes without the possibility of change. As the Magistrate Judge observed, the message that Unisys communicated to its employees in the course of counseling them about retirement was at best a half-truth because there was no mention of Unisys' right to amend or terminate the plan at any point in the future. In essence, by failing to qualify its statements, Unisys placed a period where it should have placed a comma in the course of explaining retiree medical benefits to these plaintiffs and, in doing so, misrepresented the cost and duration of the benefits.

Even though, as Unisys points out, the words "guaranteed" or "vested" were not used in describing the plaintiffs' retiree benefits under the Burroughs Medical Plan, informing the plaintiffs that they would enjoy "free or low-cost medical benefits

throughout retirement or for life" created the same impression and therefore was a misrepresentation. Additionally, we are not persuaded by Unisys' argument that its statements cannot form the basis of a breach of fiduciary duty claim because, at the time of its oral communications with the plaintiffs, Unisys did not intend to change the plan; this contention is irrelevant because Unisys had the ability to change the plan and its statements did not make this clear. *See Unisys II,* 57 F.3d at 1265 n.15 ("[W]hile Unisys may not have anticipated ending the plans, it knew that it had the ability to do so and it knew that its employees were receiving answers to their specific inquiries that were vague, misleading and contradictory."). Thus, given the content of Unisys' statements and the context in which these statements were made, the communications constituted misrepresentations and the Magistrate Judge did not err in concluding as much.

In addition to finding that Unisys misrepresented information, the Magistrate Judge also found that Unisys failed to adequately disclose benefits information because

> "[a] representation to the effect that the benefits would cost $20 per month for the retiree and then be provided at no cost for the rest of retirement or the retiree's life does not convey complete information if [Unisys] retains the right to change or terminate those benefits at any time."

Magistrate Report, 2006 WL 2822261, at *53. Relevant to Unisys' argument that it disclosed its reservation of rights in a summary plan description, the Magistrate Judge found that Unisys had a "policy that the retiree [summary plan description] was made available to those who requested it, but it was only distributed to retirees after they had submitted an enrollment card to receive retiree medical benefits under the Burroughs Plan." *Id.* at *51. The Magistrate Judge went on to explain that "there is a significant temporal aspect to the present factual scenario. [Unisys'] lack of complete disclosure regarding its reserved right to change or terminate retiree medical benefits occurred when [Unisys] was specifically counseling the Trial Plaintiffs about retiree benefits, at a time when the Trial Plaintiffs were making retirement decisions." *Id.* at *53. Therefore, Unisys' failure to disclose at this particular time its ability to modify or wholly eliminate the plaintiffs' medical benefits at any point in the future, despite its unambiguous reservation of rights clause contained in the summary plan description, resulted in an inadequate disclosure of information. Consequently, Unisys' arguments that it disclosed its reservation of rights in the summary plan descriptions and other documentation is unavailing because Unisys did not present this information when it was counseling its employees on their retirement decisions. *See Adams*, 204 F.3d at 492 ("[A] company cannot insulate itself from liability by including unequivocal statements retaining the right to

terminate plans at any time in the [summary plan descriptions].").

Turning to the third requirement, materiality, we conclude that the Magistrate Judge's analysis correctly applied our caselaw on this element by focusing on whether "there [was] a substantial likelihood" that the misrepresentations and omissions "would mislead a reasonable employee in making an adequately informed retirement decision," *Unisys II*, 57 F.3d at 1264, or "a decision regarding his benefits under the ERISA plan," *Daniels*, 263 F.3d at 73. We agree with the Magistrate Judge's conclusion that Unisys' "misrepresentations were material in that there was a substantial likelihood that each misrepresentation would mislead a reasonable employee in making a decision regarding his or her retiree medical benefits under the Burroughs Plan," and, in the context of Unisys' inadequate disclosures, that Unisys "knew of the confusion generated by its silence." Magistrate Report, 2006 WL 2822261, at *47, *51. As the Magistrate Judge determined, "a reasonable fiduciary would have foreseen that its conduct towards each Trial Plaintiff would result in important decision making on his or her part based on a mistaken belief that each possessed guaranteed lifetime benefits." *Id.* at *48, *51.

The Magistrate Judge's conclusion was well-supported by the record. In particular, the Magistrate Judge found that "the cost and duration of retiree medical benefits is a significant factor to an employee who is contemplating whether retirement is feasible

at the time," and that Unisys "knew that the retirement decision was significant, that the cost of retiree medical benefits was significant, and that participation in a specific medical plan was considered a powerful motivation in the retirement decision." *Id.* at *48, *53. Additionally, the Magistrate Judge observed that "[t]he trial record makes clear that the employee population did not understand that changes to the Burroughs Plan for active employees also translated to changes to retiree medical benefits"; Unisys "frequently referred to retiree medical benefits as though they were provided under a separate plan"; and "despite the actions it took to explain the benefits it provided, [Unisys] was aware that its employees were confused about benefits." *Id.* at *48, *51, *52. Moreover, the Magistrate Judge recognized that it could not "simply ignore the existence of the [summary plan description]," but nonetheless determined that "[e]ven taking into consideration the reservation of rights provisions" in these documents, it was foreseeable that employees in the position of the plaintiffs would rely to their detriment upon Unisys' misleading statements about the cost and duration of retiree medical benefits at the time they were seeking counsel about their retirement decisions. *Id.* at *47-48.

Unisys' argument that its reservation of the right to amend the Burroughs Medical Plan was not material because it was not considering any changes to the plan at the time it was communicating with the plaintiffs is of no consequence because the ability to

change the plan was critical information that Unisys knew and the beneficiaries needed to know in order to protect themselves from potential harm. Additionally, because it was foreseeable that these plaintiffs would rely on Unisys' misleading communications in making important decisions about their retirement, and because Unisys was aware of pervasive confusion among its employees, it was not necessary to "show[ ] that the employer had actual knowledge that a particular employee was about to be misled." *Daniels*, 263 F.3d at 76. For all of these reasons, the Magistrate Judge did not err in concluding that the materiality element was satisfied with respect to both the misrepresentations and the inadequate disclosures.

As to the fourth element, detrimental reliance, the Magistrate Judge emphasized that the plaintiffs needed to "prove on an individual basis the extent of the reliance and resulting harm." Magistrate Report, 2006 WL 2822261, at *48. The Magistrate Judge then detailed his findings for each plaintiff and concluded that twelve of them demonstrated that they reasonably relied on Unisys' misrepresentations and inadequate disclosures to their detriment; however the Magistrate Judge determined that two of the retirees, plaintiffs DiLoreto and Walnut, did not establish detrimental reliance. The District Court agreed with this conclusion. It reasoned that plaintiff DiLoreto's testimony that she refused an offer to return to work because of her reliance on representations about her retiree benefits was undermined

by the fact that she had been involuntarily terminated. District Court Opinion, 2007 WL 2071876, at *9. As for plaintiff Walnut, the District Court reasoned that although he testified that he relied on Unisys' misrepresentations in deciding to retire, this testimony was undermined by the undisputed fact that he retired as part of a settlement agreement stemming from a lawsuit he brought against Unisys. *Id.*

In their cross-appeal, the plaintiffs contend that the District Court's findings with respect to these two plaintiffs on the element of detrimental reliance are clearly erroneous. Specifically, they argue that the District Court erred by not considering that an employee's "decisions outside the retirement context also can establish detrimental reliance," and by placing the burden of demonstrating detrimental reliance on the plaintiffs. In response, Unisys asserts that the plaintiffs' arguments ignore the deferential clear error standard we use to review factual determinations, including those findings that establish detrimental reliance, and instead attempt to have us reweigh evidence and reject credibility determinations made by the Magistrate Judge. Unisys also argues that the plaintiffs incorrectly assert that they do not have to establish detrimental reliance.

As our discussion of the elements of a breach of fiduciary duty claim makes plain, a plaintiff must establish detrimental reliance in order to prevail on such a claim. *See Hooven,* 465 F.3d at 571.

Consequently, the plaintiffs' argument that DiLoreto and Walnut did not need to establish detrimental reliance in order to succeed on their claims is without merit. Moreover, the District Court specifically noted that it was not limited to considering retirement decisions, District Court Opinion, 2007 WL 2071876, at *9, as did the Magistrate Judge, reasoning that each plaintiff "may be able to establish detrimental reliance by proving that he or she declined other employment opportunities, chose to forego the opportunity to purchase supplemental health insurance, or made other important financial decisions for his or her retirement," Magistrate Report, 2006 WL 2822261, at *54. As a result, the plaintiffs' contention that the District Court erred by not considering decisions outside the retirement context is also without merit. Because we do not discern any clear error with respect to the individual factual findings that the District Court made for each of the plaintiffs or any legal error in the application of our caselaw to the facts of each plaintiff's claim, we agree with the District Court's conclusions on this element.

In sum, the facts of this case, as determined by the Magistrate Judge, demonstrate that Unisys, while acting in its fiduciary capacity, breached its duty to twelve of the fourteen plaintiffs by both misrepresenting and inadequately disclosing material information regarding retiree medical benefits which these twelve plaintiffs relied on to their detriment. Accordingly, the District Court, through its adoption of the Magistrate Judge's Report and Recommendation,

correctly concluded that twelve plaintiffs could prevail on their breach of fiduciary duty claims and we will affirm this decision.

B. Equitable Damages for Breach of Fiduciary Duty

Where a plaintiff establishes a breach of fiduciary duty, the plaintiff is entitled to equitable relief pursuant to ERISA § 502(a), which provides that:

> "A civil action may be brought –
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce the provisions of this subchapter or the terms of the plan. . . ."

29 U.S.C. § 1132(a)(3). "In light of ERISA's detailed enforcement scheme," courts must be careful to avoid creating "'remedies not specifically authorized by its text.'" *Pell*, 539 F.3d at 305 (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002)). To clarify the scope of relief authorized by ERISA, the Supreme Court in *Great-West* emphasized that "equitable relief must mean *something* less than *all* relief," and therefore "a reading of the statute that would extend the relief obtainable under § 502(a)(3) to whatever relief a court of equity is empowered to

provide in the particular case at issue (which could include legal remedies that would otherwise be beyond the scope of the equity court's authority)" had to be rejected. 534 U.S. at 209-10 (internal quotation marks omitted). The Supreme Court explained that "the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were *typically* available in equity.'" *Id.* (quoting *Mertens,* 508 U.S. at 256). Injunctions, mandamus, and restitution – but not compensatory damages - are categories of relief that the Supreme Court has recognized were typically available in equity. *See id.* at 215; *Mertens,* 508 U.S. at 256.

However, because restitution can be either legal or equitable, it is necessary to determine whether a particular request for restitution constitutes permissible equitable relief under ERISA. *See Great-West,* 534 U.S. at 212 ("[N]ot all relief falling under the rubric of restitution is available in equity."); *Skretvedt v. E.I. DuPont De Nemours,* 372 F.3d 193, 211-12 (3d Cir. 2004) ("[T]o determine whether a specific form of underlying relief requested is available under § 502(a)(3)(B), we must consider whether that relief was typically available at law or in equity and, in the case of restitutionary relief, whether the relief requested was in fact a form of equitable restitution."). In *Great-West,* the Supreme Court explained certain distinctions between legal and equitable restitution:

> "In cases in which the plaintiff could *not* assert title or right to possession of particular

> property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit that the defendant had received from him, the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. . . . In contrast, a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."

534 U.S. at 213 (internal quotation marks omitted). Crucial to the question of whether restitution lies in equity is if the action seeks "to restore to the plaintiff particular funds or property in the defendant's possession," as opposed to seeking to impose personal liability on the defendant. *Id.* at 214.

In the present case, after concluding that Unisys breached its fiduciary duty to twelve of the plaintiffs, the Magistrate Judge recommended that Unisys be ordered to provide retiree medical benefits to the prevailing plaintiffs under a reconstituted medical plan and that the benefit plan be reformed to remove Unisys' right to reduce or terminate the benefits. Magistrate Report, 2006 WL 2822261, at *65. The rationale for the first part of this remedy was that "[b]ecause the plan in which the Prevailing Plaintiffs participated no longer exists, and they were promised that the plan would provide medical coverage at no cost at age sixty-five," it would be appropriate

equitable relief to issue "a decree ordering Defendant to restore the Burroughs Plan as it existed at the time each Prevailing Plaintiff retired, or that Defendant create a new medical plan with identical provisions as the Burroughs Plan." *Id.* at *63.

The District Court accepted the Magistrate Judge's recommendation to restore the plaintiffs' medical plan but opted not to reform the plan. It explained:

> "Rather than reform the benefit plan, the court will modify the Report and Recommendation to permanently enjoin Unisys from reducing or terminating the retirees' benefits in the reconstituted Plan. Since Trial Plaintiffs were assured that their benefits would not be terminated or reduced, Unisys will be enjoined from reducing or terminating their reinstated benefits."[5]

District Court Opinion, 2007 WL 2071876, at *10. The District Court also acknowledged that, in addition to prospective relief, the plaintiffs sought "payment representing the amount Unisys financially gained as a result of their decision to retire," and argued that "the equitable remedies of 'constructive trust' and 'accounting for profits' permit them to recover money damages." *Id.* at *11, *12. With respect

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[5] The District Court explained that reformation, as opposed to an injunction, would have been necessary if it was awarding money damages for breach of the reformed contract. District Court Opinion, 2007 WL 2071876, at *10 n.7.

to the plaintiffs' constructive trust theory of recovery, the District Court stated that it was contrary to the Supreme Court's explicit language in *Great-West* that a constructive trust can only be placed on "'particular funds or property in the defendant's possession,'" and that, because the plaintiffs were unable to "identify the particular property that belongs to them, [they were] seeking the same relief as every claimant who seeks monetary damages: money that they believe belongs to them." District Court Opinion, 2007 WL 2071876, at *13 (quoting 534 U.S. at 213). As for the plaintiffs' accounting for profits theory of recovery, the District Court explained that it was still necessary to "first identify '*particular* funds or property in the defendants' possession' that belongs in good conscience" to them, and because the plaintiffs "failed to identify a specific fund or property from which they are entitled to the profits," the District Court would not order this type of equitable relief. *Id.* at *13-14.

1. The Injunctive Relief

Unisys argues that both components of the injunction ordered by the District Court – reinstating the Burroughs Medical Plan for these twelve plaintiffs and enjoining Unisys from making any changes to the plan – "exceed [ERISA's] statutory remedial authority." Unisys' chief complaint is that the injunction restricts it "in its capacity as plan sponsor and regulates non-fiduciary conduct," and, as a result, the remedy "cannot be reconciled with the settlor/fiduciary distinction recognized in ERISA"

because it eliminates "Unisys' right, as plan sponsor, to terminate retiree medical benefits 'for any reason at any time.'" Unisys continues that "any remedy must address Unisys in its fiduciary capacity and be limited to enjoining fiduciary conduct." Unisys also argues that previous decisions related to this litigation determined that the plaintiffs "were not entitled to vested retiree medical benefits in the first place," so the relief ordered by the District Court is inappropriate.

The plaintiffs respond that the injunctive relief ordered by the District Court was appropriate because it "compels future payments of medical benefits under a re-constituted plan," and "[t]he value of these benefits cannot be calculated in advance, because benefits depend on actual medical usage by each retiree and spouse and medical inflation as well as length of time each will survive." The plaintiffs also contend that, notwithstanding Unisys' argument to the contrary, "the injunction here responds directly to [Unisys'] fiduciary violation" and requires Unisys "to provide the equivalent of the lifetime benefits it misrepresented the retirees would have." Alternatively, the plaintiffs maintain that the Magistrate Judge's recommendation to reform the plan would be appropriate equitable relief as well.

In the context of a successful equitable estoppel claim under ERISA, we have previously stated that "the main question in assessing injunctions such as the one before us is whether the injunction constitutes a permissible equitable remedy or an

impermissible legal one." *Pell,* 539 F.3d at 306. In *Pell,* we explained why the injunction was an equitable remedy and not a legal one:

> "Injunctions are legal remedies if they 'compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, [a remedy that] was not typically available in equity.' The injunction imposed by the District Court in this case is forward-looking and entitles [the beneficiary] to an amount of money that cannot be calculated with specificity (since it is unknown how long he will survive and be entitled to benefits.) Therefore, the injunction is an equitable remedy that is permissible under ERISA."

Id. at 307 (citation omitted). In this same decision, we rejected the argument that "ERISA provides a cause of action only to recover the benefits that are due under the terms of an employee benefit plan" and that a beneficiary "cannot receive relief beyond that specified by the plan terms." *Id.* As support for rejecting these arguments, we cited *Unisys II,* 57 F.3d at 1264-65, and noted that the rationale applied equally for a breach of fiduciary duty claim as for an equitable estoppel claim. *Pell,* 539 F.3d at 307. Thus, we concluded that the relief was appropriate because it

> "left the plan intact while acknowledging that equity requires [the employer] to pay [the beneficiary] a higher pension amount. Our case law clearly establishes the right of

> a plaintiff . . . to receive relief beyond the benefits specified in the plan, and the District Court injunction did not rewrite or informally amend the plan."

Id. at 308.

Although *Pell* involved pension benefits, the reasoning applies with equal force to the present case. Here, as in *Pell*, the injunction "is forward-looking and entitles [the plaintiffs] to an amount of money that cannot be calculated with specificity." *See id.* at 307. Because the injunction effectuates prospective relief, as opposed to "compell[ing] the payment of money past due under a contract, or specific performance of a past due monetary obligation," it is an equitable injunction and not a legal one. *See id.* Moreover, we reject Unisys' argument that the relief goes beyond the terms of the plan by granting vested benefits because, as in *Pell*, the plaintiffs are entitled "to receive relief beyond the benefits specified in the plan," *see id.* at 308, where, as a result of Unisys' breach, the plaintiffs were led to believe that they had lifetime benefits even though the plan itself did not provide for such vested benefits. The relief does not effectuate an informal plan amendment, but instead addresses Unisys' breach of fiduciary duty by preventing Unisys from denying the plaintiffs the benefits that its communications misled them to believe they would continue to enjoy for life. We also disagree with Unisys that the injunction impermissibly regulates its settlor activity. The injunction is designed to remedy Unisys'

violation of its fiduciary duty to the plaintiffs for actions it took in its fiduciary capacity, and the specific equitable relief provision of ERISA, which applies in this case, trumps the application of the general principle that ERISA does not regulate settlor activity. Thus we conclude that the remedies ordered by the District Court were carefully prescribed and are consistent with both the statutory language of ERISA and applicable caselaw, and we will therefore uphold the remedies the District Court imposed.

2. Additional Theories for Relief

In their cross-appeal, the plaintiffs argue that the District Court committed error by refusing to order retrospective monetary relief because it confused the requirements of a constructive trust with those governing the distinct equitable remedy of disgorgement of profits. The plaintiffs argue that "[t]here is no doubt that Unisys obtained 'profits' as a result of its violations," and they assert, without support from any legal authority, that "[i]n equity, 'profits' include any form of benefit the wrongdoer derived as a result of its violation, including savings of money." According to the plaintiffs, the "significant financial advantages" that flowed to Unisys as a result of its fiduciary violation include the following:

> "(1) the avoidance of wages, pension and savings plan accruals, and other fringe benefits it would have had to pay to the retirees if they had not been induced to retire or resign; (2) premiums paid to Unisys by

> some retirees for medical coverage under the replacement Unisys retiree medical plan that took effect January 1, 1993; (3) medical expenditures unjustly shifted to retirees who secured their health insurance coverage from third parties; (4) savings to Unisys as a result of providing a plan of benefits that was inferior to the promised Burroughs benefits; and (5) additional gains to Unisys from its improper retention and use of these funds."

Unisys responds by arguing that the plaintiffs are really seeking compensatory damages under the guise of an equitable remedy. Unisys contends that, regardless of what the plaintiffs call their request, they are attempting "to expand the limited scope of the 'accounting for profits' remedy traditionally available in equity to encompass all forms of restitution for unjust enrichment." Moreover, Unisys asserts that the plaintiffs cannot prevail on their request for an equitable accounting for profits without first identifying the underlying property from which the profits are purportedly derived.

Requests for monetary damages are suspect in this context. In the words of the Supreme Court:

> "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the

> defendant's breach of a legal duty. And money damages are, of course, the classic form of *legal* relief."

Great-West, 534 U.S. at 210 (internal quotation marks and citation omitted). Although "some forms of equitable relief – such as constructive trusts, equitable liens, or accounting for the profits derived from wrongly held property – include the payment of money . . . , these forms of relief are available in limited circumstances." *Eichorn v. AT & T Corp.,* 484 F.3d 644, 655 n.6 (3d Cir. 2007). Thus, for the plaintiffs, the question here is not whether disgorgement of profits or accounting for profits is an equitable remedy, but rather whether the plaintiffs have demonstrated that their claims for relief meet the requirements for applying this type of remedy. We agree with the District Court that the plaintiffs cannot recover under this theory without first identifying the profit generating property or money wrongly held by Unisys. *See Great-West,* 534 U.S. at 214 n.2. Because the plaintiffs are unable to identify "money or property . . . belonging in good conscience" to them and clearly "trace[able] to particular funds or property in the defendant's possession," *see id.* at 213, they cannot recover profits from Unisys as a form of equitable relief. Consequently, the District Court properly denied the plaintiffs' request for retroactive monetary damages.

Moreover, a review of the "significant financial advantages" that the plaintiffs claim Unisys reaped at their expense, and for which the plaintiffs seek to

recover money, makes it all the more apparent that the plaintiffs are trying to recoup compensation for their own expenditures as opposed to profits held by Unisys to which they are entitled. *See Eichorn,* 484 F.3d at 656 (explaining that when the relief sought is measured in terms of the plaintiffs' loss as opposed to the defendant's gain, the monetary damages sought are in the nature of a legal remedy and not an equitable one). While we do not doubt that the plaintiffs have incurred additional expenses as a result of Unisys' termination of the Burroughs Medical Plan, compensation for these expenses does not come within ERISA's authorization of "appropriate equitable relief" and therefore is not available as a remedy for Unisys' breach of fiduciary duty. *See id.* at 655 (rejecting a request from ERISA plaintiffs that was "framed as an 'equitable' injunction" when "in essence, [the] request [was] for compensatory damages"); *see also Great-West,* 534 U.S. at 217 ("Like it or not, . . . [the law-equity] classification and distinction has been specified by the statute; and there is no way to give the specification meaning – indeed, there is no way to render the unmistakable limitation of the statute a limitation at *all* – except by adverting to the differences between law and equity to which the statute refers."). Because the additional relief the plaintiffs seek was not typically available in equity, it is not an appropriate equitable remedy under ERISA, and we will uphold the District Court's decision on this issue.

C. Attorneys' Fees

"ERISA allows a prevailing party to recover a reasonable attorney's fee and costs of action." *Hahnemann Univ. Hosp.*, 514 F.3d at 310 (internal quotation marks omitted). ERISA's fee provision states: "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). In determining whether to award attorneys' fees, a District Court must consider several factors. *See Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983). The relevant factors include:

> "(1) the offending parties' culpability or bad faith; (2) the ability of the offending parties to satisfy the award of attorneys' fees; (3) the deterrent effect of an award of attorneys' fees against the offending parties; (4) the benefit conferred upon members of the pension plan as a whole; and (5) the relative merits of the parties' position."

Id. at 673; *accord Martorana v. Bd. Trs. of Steamfitters Local Union 420 Health, Welfare & Pension Fund*, 404 F.3d 797, 804 (3d Cir. 2005). "[T]he *Ursic* factors are not requirements in the sense that a party must demonstrate all of them in order to warrant an award of attorney's fees, but rather they are elements a court must consider in exercising its discretion." *Fields v. Thompson Printing Co.*, 363 F.3d 259, 275 (3d Cir. 2004).

The District Court, in its June 26, 2008 opinion, carefully analyzed the *Ursic* factors and then went "line, by line, by line through the billing records supporting the fee request," in the course of "conclud[ing] that a total of $48,708.58 should be stricken from the Petition," and awarding $2,266,357.92 in attorneys' fees and $97,779.98 in litigation expenses. Fee Opinion, 2008 WL 2600364, at *14 (internal quotation marks omitted). With respect to the first *Ursic* factor, culpability or bad faith, the District Court concluded that "this case does not appear to involve a simple lapse of judgment or care on the part of" Unisys, and that "[t]he duty of a fiduciary to convey complete and accurate information to beneficiaries was established long before [Unisys] engaged in the conduct at issue in this case." *Id.* at *3 (internal quotation marks omitted). As to the second factor, ability to pay, the District Court noted that the plaintiffs asserted that Unisys, "a large corporation with billions of dollars in assets, can satisfy the fee award," and that Unisys did not challenge this assertion. *Id.* at *4. Under the third factor, deterrence, the District Court determined that, because Unisys' "conduct was undertaken knowingly . . . , an award of attorney's fees would deter such knowing conduct in the future." *Id.* For the fourth factor, benefit conferred, the District Court concluded that "[b]ased on the efforts of the Prevailing Plaintiffs, the parties have a better understanding of the strengths and weaknesses of the remaining claims, thus allowing for prompt resolution or settlement." *Id.* at *5. Finally, regarding the fifth factor, relative merits

of the parties' positions, the District Court concluded that although Unisys' "legal position was not wholly without merit, . . . on balance, this factor weighs slightly in favor of an award of attorneys' fees." *Id.* In sum, the District Court stated: "No factor weighs against a fee award, and the Court finds no reason to deviate from the principle that 'the defendant in an ERISA action usually bears the burden of attorney's fees for the prevailing plaintiff or plaintiff class, thus encouraging private enforcement of the statutory substantive rights. . . .'" *Id.* at *6 (select internal quotation marks omitted) (quoting *Brytus v. Spang & Co.*, 203 F.3d 238, 242 (3d Cir. 2000)).

Despite the District Court's thorough analysis of the reasonableness of the fee award, Unisys contends that the award should be "dramatically reduced," arguing, in relation to the first factor – culpability or bad faith – that "Unisys actually prevailed on two of the three claims originally raised by Plaintiffs because of its repeated disclosure[s]," and, in relation to the fifth factor – relative merits – that "Plaintiffs have obtained only a very small portion of the relief sought." Additionally, Unisys maintains, apparently in the context of the fourth factor – benefit conferred – that "the 'prevailing' Plaintiffs recovered only a portion of the relief they sought, and two Plaintiffs lost on all of their claims."

The plaintiffs contend that the District Court correctly applied the *Ursic* factors and did not abuse its discretion in concluding that all five factors weighed in favor of the fee award. The plaintiffs also

assert that, to the extent that Unisys appears to argue that the fee amount must be proportionate to the value of the relief obtained, its argument is foreclosed by *Hahnemann University Hospital*, 514 F.3d at 311, in which a "proportionality rule for attorneys' fees awarded under ERISA" was rejected. Additionally, the plaintiffs point out that "Unisys makes no argument concerning particular fee and expense entries," and instead contends that "the award should be 'substantially' reduced in some vague, undefined way."

Unisys' arguments are not persuasive and the plaintiffs' arguments help to underscore the reasonableness of the District Court's exercise of its discretion in approving the fee award. The District Court's thorough and careful analysis is consistent with our Court's caselaw on this subject and its award of attorneys' fees was not an abuse of discretion. Therefore, we will not disturb its award of fees and expenses.

IV.

For the reasons stated above, the District Court correctly concluded that twelve of the fourteen plaintiffs established that Unisys breached its fiduciary duty to them and it ordered appropriate equitable relief to remedy Unisys' violation of ERISA. Additionally, the District Court did not abuse its discretion in awarding reasonable attorneys' fees to

the plaintiffs. Accordingly, we will affirm the District Court's orders in all respects.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: UNISYS CORPORATION RETIREE MEDICAL BENEFITS ERISA LITIGATION	:	**MDL DOCKET NO. 969**
ADAIR, HARLEY, J., *et al.*	:	**CIVIL ACTION**
v.	:	**NO. 03-3924**
UNISYS CORPORATION	:	

MEMORANDUM AND ORDER

Kauffman, J. **July 16, 2007**

Now before the Court is the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter regarding the claims of 14 plaintiffs ("Trial Plaintiffs") in the above-captioned action.[1] Both Defendant Unisys Corporation ("Unisys") and Trial Plaintiffs have submitted written Objections to the Report and Recommendation. For the reasons that follow, and after consideration of the written submissions of the parties, the Objections will

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[1] These claims were severed for separate trial pursuant to Fed. R. Civ. P. 53 and a Stipulation and Order dated July 15, 2005. Trial Plaintiffs are Theodore Botzum, Mary Castorani, Ernestine DiLoreto, Eugene Endress, Dennis Gallagher, Henry Geneva, Elihu Ginsberg, Howard Hansell, Vernon Horshaw, Helen Peterman, Robert Schieman, Ruth Stringer, Anne Walnut, and Thomas Yeager.

be denied, and the Report and Recommendation will be approved and adopted in part and modified in part.[2]

I. BACKGROUND

Trial Plaintiffs are individuals who retired from Unisys between 1987 and 1989, and who formerly were employed by a Unisys predecessor, the Burroughs Corporation. They assert that Unisys breached its fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Specifically, Trial Plaintiffs allege that Unisys (1) misrepresented that their retiree medical benefits were vested and could not change despite clauses in certain plan documents reserving the right to modify or terminate those benefits, and (2) failed adequately to advise them of that reserved right.

For many years, Trial Plaintiffs' claims were subsumed within a class action. The history of that class action begins in September 1986, when the Sperry Corporation ("Sperry") and the Burroughs

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[2] "In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions." Fed. R. Civ. P. 53(g)(1). "The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony." Fed. R. Civ. P. 53 advisory committee's note on 2003 amendments.

Corporation ("Burroughs") merged to form Unisys. Before the merger, Sperry and Burroughs had provided their retiring employees with post-retirement medical coverage at little or no cost to the retirees. After the merger, Unisys continued the pre-existing medical benefit plans ("the predecessor plans") for Sperry and Burroughs retirees.

In 1989, Unisys created the Post-Retirement and Extended Disability Medical Plan ("the old plan") to cover all employees who retired after April 1, 1989, most of whom were former Sperry and Burroughs employees. The predecessor plans continued to cover former employees who had retired before April 2, 1989. On January 1, 1993, Unisys terminated both the predecessor plans and the old plan, and replaced them with the new Unisys Post-Retirement and Extended Disability Medical Plan ("the new plan"). The new plan, under which the retirees now are required to pay the full cost of their premiums, sharply contrasts with the old plan and the predecessor plans under which Unisys had paid most or all of the premiums.

As a result of this drastic cut in benefits, eight different lawsuits were filed against Unisys in several jurisdictions in 1992 and 1993. The Judicial Panel on Multidistrict Litigation transferred all lawsuits filed outside the Eastern District of Pennsylvania to this district for consolidated disposition. *See* 28 U.S.C. § 1407. On June 9, 1993, pursuant to stipulation of the parties and Federal Rule of Civil Procedure 23(b)(2), the Court (Cahn, C.J.) certified the class of

approximately 21,000 former non-union employees of Sperry, Burroughs, and Unisys, divided into subclasses and subgroups.

The class members, in addition to claiming breach of fiduciary duty, also asserted breach of contract and estoppel claims. These claims eventually were dismissed on summary judgment. Judge Cahn found that the reservation of rights clauses in the plan documents barred the class members from claiming that they contractually were entitled to free or low-cost medical benefits for life, and the Third Circuit affirmed. *In re: Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 837 F. Supp. 670 (E.D. Pa. 1993), *aff'd*, 58 F.3d 896 (3d Cir. 1995).

In a related opinion, however, the Third Circuit held that the class members could maintain a claim for breach of fiduciary duty under ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), despite the reservation clauses retaining the company's right to terminate the plans. *In re: Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 57 F.3d 1255 (3d Cir. 1995). Furthermore, the Court held that equitable relief was available under ERISA to individual plan participants who could prove a breach of fiduciary duty by showing one or both of the following: (1) that Unisys representatives counseled them that they had lifetime medical benefits without making reference to the reservation of rights clause, even though the representatives were aware that many employees mistakenly understood such counsel to mean that such benefits became vested at the time of

retirement, *see id.* at 1260-61; or (2) that Unisys representatives affirmatively represented to them that their medical benefits were guaranteed once they retired, when the company knew in fact that this was not true. *See id.* at 1266-67. The appeal dealt only with the claims of the Sperry retirees, but after the decision, the breach of fiduciary duty claims of all class members were reinstated. The Third Circuit remanded to the District Court to determine the breach of fiduciary claims.

On March 10, 1997, Judge Cahn granted summary judgment in Unisys's favor on the breach of fiduciary duty claims asserted by: (1) Plaintiffs who retired more than six years prior to the filing of the Complaint, because their claims were barred by the statute of limitations; and (2) Plaintiffs who left the company involuntarily, because they failed to establish detrimental reliance. *In re: Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 957 F. Supp. 628 (E.D. Pa. 1997). The Third Circuit, however, reversed and reinstated both sets of claims in March 2001. *In re: Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 242 F.3d 497 (3d Cir. 2001).

With respect to the retirees who had left the company early, the Third Circuit concluded that some individuals may have detrimentally relied on the alleged misrepresentations in reaching important life decisions made after their retirements. Thus, the Court reasoned, they may have timely claims depending upon the date and nature of their reliance. *Id.* at 506. With respect to the retirees who left the

company involuntarily, the Court held that they may have made important life decisions other than choosing to retire that could support a breach of fiduciary duty claim. *Id.* at 507-10.

After the Third Circuit's decision, Unisys moved to decertify the class. This Court granted the motion because, based on the Third Circuit's rulings, each individual plaintiff would need to demonstrate particularized proof that, for example, misrepresentations were made to him or her and that he or she detrimentally relied on the misrepresentations. *In re: Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 2003 U.S. Dist. LEXIS 1577, 29 Employee Benefits Cas. (BNA) 2473 (E.D. Pa. Feb. 4, 2003) (Kaufman, J.).[3]

Unisys has settled the majority of the claims against it, including the claims of all members of the Sperry sub-class. *See* Order and Final Judgment Approving Partial Settlement, dated January 24, 2003. In the wake of the decertification, however, hundreds of individual actions remained pending against Unisys. After attempts to settle those cases failed, the parties stipulated to sever and try the claims of Trial Plaintiffs. Pursuant to Fed. R. Civ. P. 53, the claims of Trial Plaintiffs were referred to

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[3] On January 5, 1999, the Unisys class action was reassigned from the calendar of Judge Cahn to the calendar of this Court.

Magistrate Judge Thomas J. Rueter to conduct a trial and issue a Report and Recommendation.

Magistrate Judge Rueter held a bench trial from October 17 to October 26, 2005. On September 29, 2006, after oral argument on questions of both law and fact, Magistrate Judge Rueter issued a 123-page Report and Recommendation. He found that 12 of the 14 Trial Plaintiffs had proven their breach of fiduciary duty claims and were entitled to an injunction compelling Unisys to re-enroll them in a medical plan with the benefits they were assured they would continue to receive.[4]

II. OBJECTIONS TO THE FINDINGS OF FACTS

Federal Rule of Civil Procedure 53(g) governs the parties' Objections to Magistrate Judge Rueter's Report and Recommendation. The Court must review the findings of fact *de novo*, unless the parties stipulate that the "master's findings will be reviewed for clear error." Fed. R. Civ. P. 53(g)(3)(A). The parties in this case stipulated to a clear error standard of review. Stipulation and Order dated July 14, 2005.

The clear error standard of review is highly deferential. Clear error exists only when the fact

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[4] The Magistrate Judge found that Trial Plaintiffs Walnut and DiLoreto failed to meet their burden of proof with respect to detrimental reliance, a necessary element of their breach of fiduciary duty claims.

finder's determination "either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 92 (3d Cir. 1992) (citations omitted). Accordingly, the Court must give "all due deference to the opportunity of the [magistrate] judge to evaluate the credibility of witnesses and to weigh the evidence," and must not overturn a factual finding unless the Court is left with the "definite and firm conviction that mistake has been committed." *Commerce Nat'l Ins. Servs., Inc. v. Commerce Ins. Agency, Inc.*, 214 F.3d 432, 435 n.1 (3d Cir. 2000).

After carefully reviewing the parties' Objections, the Court finds that neither side has shown clear error in the factual findings. Magistrate Judge Rueter's Report and Recommendation is a thoughtful evaluation of the Record. His findings of fact are detailed and amply documented. The parties have failed to demonstrate that any of his factual findings are "completely devoid" of some credible evidentiary support. *Haines*, 975 F.2d at 92. Accordingly, the Court adopts and affirms the Report and Recommendation's findings of fact.

III. OBJECTIONS TO THE CONCLUSIONS OF LAW

A. Standard of Review

Federal Rule of Civil Procedure 53(g)(4) provides that "the court must decide *de novo* all Objections to

conclusions of law made or recommended by [the Magistrate Judge]."

B. Unisys's Objections Regarding Breach of Fiduciary Duty

Unisys raises six legal objections to the Magistrate Judge's conclusion that the company breached its fiduciary duty to Trial Plaintiffs.

1. The Magistrate Judge Did Not Discount the Medical Plan "SPDs"

First, Unisys argues that the Magistrate Judge erred as a matter of law by "discounting" the Burroughs Medical Plan documents (including the "Summary of Plan Description" or "SPD") in which the company communicated its right to change or terminate the plan. Unisys argues that it cannot be held liable for a breach of fiduciary duty for misrepresenting to employees that their benefits would not be terminated because it repeatedly advised plan participants in writing of its right to alter the benefit plan.

The Third Circuit, however, has ruled in this case "(1) that the SPD did not as a matter of law satisfy Unisys's fiduciary responsibility," and "(2) that . . . [the] trier of fact could conclude that Unisys should have foreseen that its conduct with respect to at least some of the [Sperry] class would cause reasonable employees to rely to their detriment, *despite the*

existence of the SPD." In re: Unisys, 242 F.3d at 508 (emphasis added).

The Magistrate Judge clearly did not ignore or "discount" the reservation of rights provision in the SPD. Rather, he found that the evidence cited by Unisys failed to "outweigh the affirmative misrepresentations made by the company." Conclusion of Law ("COL") ¶ 34. Specifically, the Magistrate Judge found that the company knew that its employees were confused about benefits. *See* Finding of Facts ("FOF") ¶¶ 80, 88, 90. Yet, despite that knowledge, the company misrepresented the cost and duration of retiree medical benefits. It did this while Trial Plaintiffs were making retirement decisions and while it was advising them about the benefits the company would provide during retirement.

Under the legal framework laid out by the Third Circuit, the factual findings of the Magistrate Judge are sufficient to support a breach of fiduciary duty claim. Accordingly, Unisys's first legal objection will be denied.

2. The Magistrate Judge Correctly Found that Unisys Made Affirmative Misrepresentations

Second, Unisys argues that the Magistrate Judge erred as a matter of law in concluding that it made affirmative misrepresentations to Trial Plaintiffs because no retiree was promised that his or her medical benefits were "vested," "guaranteed," or

"locked in." According to Unisys, Trial Plaintiffs generally were told that they were required to pay $20 per month toward the cost of their participation in the Burroughs Medical Plan until age 65, after which the company would pay the full cost. "Under the terms of the Plan as it existed from 1983 until 1992, such statements were undeniably true." Unisys's Memo. of Law in Support of Objections at 24.

As Unisys points out, "[a]n 'honest statement of belief reasonably grounded in fact does not constitute a misrepresentation.'" *Peterson v. American Telephone & Telegraph Co.*, 127 Fed. Appx. 67, 73 (3d Cir. 2005) (citing *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 990 (3d Cir. 1995)); *accord Leuthner v. Blue Cross & Blue Shield of Northeastern Pa.*, 454 F.3d 120, 129 (3d Cir. 2006) ("A representation is not a misrepresentation if it is an accurate reflection of the plan administrator's intent when the statement was made.").

However, Unisys is accused of purposefully withholding from the plan beneficiaries a full and accurate description of their benefits. Even when "representations accurately describe[ ] the terms of [a] Pension Plan, if the representations were made for the purpose of intentionally misleading those considering . . . retirement, then these representations may still give rise to a breach of fiduciary duty under ERISA." *Romero v. Allstate Corp.*, 404 F.3d 212, 227 (3d Cir. 2005); *see also Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 200 n.19 (3d Cir. 1990) (holding that a misrepresentation may

arise from a failure "to disclose sufficient information to render statements actually made not misleading").

The alleged misrepresentations made by Unisys may not have been technically false, but the factual findings of the Magistrate Judge establish that they were nonetheless misleading. They were misleading because the company failed to qualify adequately the information it supplied regarding the low cost of the Burroughs plan with an acknowledgment that the company could modify or terminate the retirees' medical benefits. The company knew its employees were confused and that this confusion would benefit the company financially.

3. The "Serious Consideration" Test Is Not Applicable Here

Third, Unisys argues that its misrepresentations to Trial Plaintiffs were not material because they were made prior to "serious consideration" by management of the retirement benefit reductions at issue in this case. Unisys's argument is based on the Third Circuit's decision in *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996). In *Fischer*, the Court held that a plan administrator makes a material misrepresentation when it asserts to employees that it is not considering changing benefits, but actually is seriously considering a change. *Id.* at 1539. Serious consideration occurs when "(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to

implement the change." *Id.* Because the benefit changes at issue in this case were not considered seriously by Unisys's senior management until after Trial Plaintiffs already had retired, Unisys argues that the claims should be barred.

The serious consideration test of materiality, however, is not applicable to this case. The test is applicable where "the misrepresentation in question is the statement that no change in benefits is under consideration." *Fischer,* 96 F.3d at 1538. By contrast, the allegation here is that Unisys told its workers that they would have lifetime medical benefits if they retired by a certain date, when it actually reserved the right to terminate those benefits at any time. The misrepresentations by Unisys are material because "there is a substantial likelihood that it [misled] reasonable employee[s] in making an adequately informed retirement decision." *In re: Unisys,* 57 F.3d at 1264 (citing *Fischer v. Philadelphia Elec. Co.,* 994 F.2d 130, 135 (3d Cir. 1993)).

4. Trial Plaintiffs' Claims Are Not Barred by the Statute of Limitations

Fourth, Unisys argues that Trial Plaintiffs' claims are time-barred by ERISA § 413, which bars a breach of fiduciary duty claim that commences "three years after the earliest date on which the plaintiff

had actual knowledge of the breach or violation." ERISA § 413(2).[5] In order to demonstrate that Trial Plaintiffs' claims are barred by § 413(2), Unisys must meet a "stringent" standard. *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1176 (3d Cir. 1992). The "actual knowledge" standard "requir[es] not only actual knowledge of the facts giving rise to the fiduciary violation but also [ ] requir[es] actual knowledge that those facts support a cause of action under ERISA." *Richard B. Roush, Inc. Profit Sharing Plan v. New England Mut. Life Ins. Co.*, 311 F.3d 581, 585 (3d Cir. 2002) ("*Roush*").

Unisys argues that two events gave Trial Plaintiffs "actual knowledge" of its alleged breach of fiduciary duty. First, Unisys argues that by 1989, each of the Trial Plaintiffs received a supplemental SPD which expressly stated that the company reserved the right to change or terminate retiree medical benefits. FOF ¶ 40-42. The reservation of rights clause, however, was buried in page twenty-eight of a thirty-nine page booklet. *See* Defendant's Exhibit 4 at 29. To have discerned a cause of action from receipt of the retiree SPD would have required an exacting review of the SPD. This level of "research and scrutiny" is inconsistent with § 413's actual knowledge standard, particularly in light of the various affirmative misrepresentations made by the

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[5] This is one of two time limitations found in ERISA § 413. Unisys does not argue that Trial Plaintiffs' claims are barred by the six-year statute of limitations found in § 413(1).

company. *Roush*, 311 F.3d at 585-6 (citing *Gluck*, 960 F.2d at 1179). Accordingly, the Court finds that the SPD did not impart "actual knowledge." 29 U.S.C. § 1113.

Unisys also argues that a reduction in the level of prescription drug benefits, which was revealed in late 1989, "amounted to an open announcement of the company's right to change or terminate retiree medical benefits," and thus gave Trial Plaintiffs actual knowledge of its alleged breach.[6] Unisys Memo. of Law in Support of Objections at 39. Trial Plaintiffs counter that the reduction in prescription drug benefits in 1989 was a minor change and did not give notice that Unisys retained the ability to terminate the benefit plan.

In any event, the Court finds that Unisys's reduction of prescription drug benefits in 1989 does not bar Trial Plaintiffs' claims. Through stipulations, the parties have agreed that Trial Plaintiffs

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[6] Unisys analogizes the change in prescription drug benefits to the facts of *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996). In *Kurz*, the Third Circuit addressed the failure of PECO to apprise retirement plan participants of the possibility of future plan enhancements under serious consideration at the time of their retirement. The *Kurz* beneficiaries alleged that the company affirmatively misrepresented to them that no retirement benefit enhancements were under consideration when they retired. The Third Circuit held that once PECO announced benefit enhancements shortly after the plaintiffs' retirement, all the material elements of a breach of fiduciary duty claim were "patently obvious" to the plaintiffs. *Id.* at 1551.

constructively filed suit on December 3, 1992. Accordingly, the company must establish that Trial Plaintiffs received notice of the change by December 3, 1989. The change in benefits did not take effect until January 1, 1990. Unisys mailed a letter announcing the reduction, but it was not dated. One Unisys employee testified that the notice was "sent out in November of 1989." N.T. 10/25/05 at 207. Another employee testified that a notice was mailed out "near the end of [1989]." N.T. 10/24/05 at 219. However, it is not clear from this testimony that any of the Trial Plaintiffs actually received copies of the announcement prior to December 3, 1989. Accordingly, the Court finds that Unisys has failed to meet the "stringent" standard for establishing that Trial Plaintiffs had actual knowledge of the company's breach of fiduciary duty before December 3, 1989. *Gluck,* 960 F.2d at 1176.

5. Trial Plaintiffs Have Standing

Fifth, Unisys argues that Trial Plaintiffs do not have standing to assert their breach of fiduciary duty claims. The Court disagrees. "[A]n employee may recover for a breach of fiduciary duty if he or she proves that an employer, acting as a fiduciary, made a misrepresentation that would confuse a reasonable beneficiary about his or her benefits, and the beneficiary acted thereupon to his or her detriment." *Leuthner v. Blue Cross & Blue Shield of Northeastern Pa.,* 454 F.3d 120, 127-8 (3d Cir. 2006) (citing *In re: Unisys,* 242 F.3d at 505). Thus, if Trial Plaintiffs raise

"a colorable claim of such a breach and detrimental reliance, then they would have standing because they would have a colorable claim to be eligible for equitable relief under § 502(a)(3)." *Id.* at 128. Here, Trial Plaintiffs have raised a colorable claim for breach of fiduciary duty and their detrimental reliance. Accordingly, Trial Plaintiffs have standing.

6. Trial Plaintiffs Established Fiduciary Status

Sixth, Unisys argues that certain Trial Plaintiffs failed to establish that misrepresentations were made by someone with fiduciary status because they could not identify who made the alleged misrepresentation to them or they only identified a non-fiduciary supervisor. To prove a breach of fiduciary duty claim, a plaintiff must establish that the alleged communication was made by an authorized fiduciary. *See Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3d Cir. 2001). Under ERISA, a fiduciary is any person who "exercises any discretionary authority or discretionary control respecting management of such plan or . . . has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Unisys acted as plan administrator in making the communications to Trial Plaintiffs that are the basis of their claims of breach of fiduciary duty. "[W]hen a plan administrator explains plan benefits to its employees, it acts in a fiduciary capacity." *In re: Unisys*, 57 F.3d at 1261 n.10.

Trial Plaintiffs contend that when various human resources staff members and/or supervisors communicated with them about retiree medical benefits, they were functioning as ERISA fiduciaries. For an individual to qualify as an ERISA fiduciary, he or she must have actual or apparent authority to advise the company's employees of their rights under the plan at issue. *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988-89 (3d Cir. 1995).

Apparent authority "(1) 'results from a manifestation by a person that another is his agent' and (2) 'exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized.'" *Taylor*, 49 F.3d at 989 (quoting Restatement (Second) of Agency § 8 cmts. a & c (1958)). Furthermore, "apparent authority arises in those situations where the principal causes persons with whom the agent deals to reasonably believe that the agent has authority." *Id.* (internal quotations and citations omitted).

The factual findings of the Magistrate Judge establish that the company's agents had apparent or actual authority as ERISA fiduciaries. First, the Magistrate Judge found that the company delegated to the human resources staff and other managers the function of advising employees about benefits. Second, he credited the testimony of each individual Trial Plaintiff that he or she was advised by either a member of the human resources staff or a supervisor about the cost and duration of retiree medical benefits. *See, e.g.*, FOF ¶¶ 80, 82-85. Third, he found

that the communications at issue were made by company representatives in the context of assisting Trial Plaintiffs with gathering information about retiree benefits, and were made at the time that each Trial Plaintiff was contemplating specifically his or her financial ability to retire. *See* FOF ¶¶ 91-372. Under these circumstances, it was reasonable for Trial Plaintiffs to believe that Unisys's agents had authority to advise them regarding benefits.

While some Trial Plaintiffs could not name the Unisys agent who advised them, the Magistrate Judge nevertheless found that each of these Trial Plaintiffs "spoke with a member of the human resources department regarding retiree benefits and that such meetings formed the basis of their understanding as to the cost and duration of the benefits." COL ¶ 8. Despite this finding, Unisys argues that as a matter of law the claims of these Trial Plaintiffs must fail because it has been denied the "opportunity to call the alleged speaker as a witness or present other witnesses who could refute the speaker's alleged fiduciary status." Unisys Memo. of Law in Support of Its Objections at 44-45.

The issue, however, is whether Trial Plaintiffs have proven that a fiduciary made misrepresentations to them, not whether they are able to remember names. The Magistrate Judge found that, despite Trial Plaintiffs' inability to identify the speakers, other evidence led to the conclusion that authorized members of Unisys's human resource staff did counsel Trial Plaintiffs about retiree medical benefits.

Accordingly, Trial Plaintiffs established fiduciary status.

Defendant also contends that the misrepresentation claims of certain Trial Plaintiffs fail as a matter of law because the communications at issue were made by supervisors who did not have authority to speak on behalf of the company regarding benefits. Again, however, there is no rule that a supervisor cannot act as a fiduciary. Based on the facts found by the Magistrate Judge, it was reasonable for certain Trial Plaintiffs to believe that their supervisors were acting on the company's behalf and within the scope of their authority as agents of the company when advising them about the cost and duration of their retiree medical benefits. In light of these findings, the Magistrate Judge did not err in concluding that certain of the Trial Plaintiffs' supervisors had apparent authority to advise them regarding their retirement benefits.

C. The Parties' Objections Regarding Detrimental Reliance

Unisys argues that the Magistrate Judge's finding that Trial Plaintiffs detrimentally relied on its misrepresentations is erroneous because there is inadequate support in the record for such a conclusion. To prevail, each Trial Plaintiff was required to prove that he or she relied upon the claimed misrepresentation or omission to his or her detriment. *See, e.g., Daniels*, 263 F.3d at 73; *Burstein*

v. Ret. Acct. Plan for Employees of Allegheny Health Educ. and Research Found., 334 F.3d 365, 387 (3d Cir. 2003). A decision to retire is a sufficient form of reliance in an ERISA fiduciary breach action. *In re: Unisys*, 242 F.3d at 507. Furthermore, other forms of reliance can form a valid basis for relief. *Id.* ("[W]e decline Unisys' invitation to adopt an across the board prohibition of relief based upon reasonable reliance in contexts other than retirement decisions.").

The Magistrate Judge found that 12 of the 14 Trial Plaintiffs ("Prevailing Plaintiffs") established that they detrimentally relied on Unisys's misrepresentations. These conclusions were based on specific factual findings. For example, the Magistrate Judge credited Trial Plaintiff Stringer's testimony that she would not have retired when she did, and that she would have continued working at Unisys until age sixty-five, but for Unisys's misrepresentations. FOF ¶ 202. She also would not have installed a swimming pool in her home or helped her granddaughter purchase a home. *Id.* Likewise, the Magistrate Judge credited the testimony of Trial Plaintiff Yeager that if he had known that Unisys had the right to change or terminate the Burroughs Plan at any time, he would not have retired until age sixty-five and that "participation in the Burroughs Plan was the most significant consideration in his decision to retire at the time he did." FOF ¶ 262. As these examples demonstrate, the factual findings of the Magistrate Judge sufficiently support the conclusion that

Prevailing Plaintiffs detrimentally relied on Unisys's misrepresentations.

Similarly, despite Trial Plaintiffs' objections, the Magistrate Judge correctly concluded that Trial Plaintiffs Walnut and DiLoreto failed to establish detrimental reliance. DiLoreto testified that she refused an offer to return to work in January 1987 because she was assured her retiree medical benefits were guaranteed. This evidence, however, was undermined by the fact that Unisys permanently terminated DiLoreto in 1986 as part of an involuntary layoff in her department. FOF ¶ 94. Furthermore, her testimony regarding the circumstances surrounding the alleged offer to return to work was vague. FOF ¶ 104. Accordingly, the Magistrate Judge did not err by refusing to credit her testimony.

The same conclusion applies to Trial Plaintiff Walnut. Walnut testified that he relied on Unisys's misrepresentations in making his retirement decision. FOF ¶ 142. However, his testimony was undermined by the undisputed fact that he retired pursuant to a Settlement Agreement that resolved a lawsuit he brought against Unisys. The Settlement Agreement contained an integration clause that stated it contained the "entire agreement" of the parties and it did not promise lifetime benefits. *Id.* Accordingly, the Magistrate Judge did not err by refusing to credit his testimony.

D. The Parties' Objections Regarding Remedies

1. Unisys's Objections

The Prevailing Plaintiffs' breach of fiduciary duty claims are brought pursuant to ERISA § 502(a)(3), which states in pertinent part:

> A civil action may be brought –
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms or the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce the provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

The Magistrate Judge recommended (1) that Unisys be ordered to provide retiree medical benefits to Prevailing Plaintiffs under a reconstituted medical plan, and (2) that the benefit plan be reformed to remove Unisys's right to reduce or terminate benefits. Unisys argues that the Magistrate Judge erred because these remedies are not "appropriate equitable relief." 29 U.S.C. 1132(a)(3). Indeed, Unisys's position is that Trial Plaintiffs, even if they prove a breach of fiduciary duty, are entitled to no remedy whatsoever.

Unisys first argues that the Magistrate Judge erred in recommending reformation to remove its

right to terminate or reduce benefits in a reconstituted plan because the doctrine of reformation is "available only to correct a fraud or mistake in the plan document arising *prior to* the preparation of the document." Unisys's Memo. in Support of Objections at 30 (emphasis in original). In other words, the company argues that reformation is available exclusively when the parties come to an agreement, "but by fraud or mistake write it down in some fashion that does not truly reflect their contract." Dobbs, Law of Remedies, § 4.3(7), at 617 (2d ed. 1993) ("Dobbs"). Here, Unisys claims that reformation is impossible because it always fully intended to reserve the right to reduce or terminate the retiree's medical benefits.

The Court need not reach this argument. Rather than reform the benefit plan, the Court will modify the Report and Recommendation to permanently enjoin Unisys from reducing or terminating the retirees' benefits in the reconstituted Plan.[7] Since Trial Plaintiffs were assured that their benefits would not be terminated or reduced, Unisys will be enjoined from reducing or terminating their reinstated benefits. This remedy is within the equitable powers of the Court pursuant to ERISA § 502(a)(3). 29 U.S.C. § 1132(a)(3) ("A civil action may be brought . . . to enjoin any act or practice. . . .").

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[7] Reformation, as opposed to an injunction, would be necessary only if the Court sought to award money damages for breach of the reformed contract. *See* Dobbs § 4.3(7), at 618.

In this context, the Court is mindful of the Third Circuit's dicta in *In re: Unisys,* 57 F.3d 1255. There, the Court stated that "an injunction ordering specific performance of the assurances Unisys made" and "restitutionary reimbursement for back benefits" were remedies that were equitable in nature, and thus available under ERISA § 502(a)(3). *Id.* at 1269. As discussed *infra,* intervening Supreme Court precedent has clarified that "restitutionary reimbursement" can no longer be considered an equitable remedy. There is, however, no similar reason to doubt that an "injunction ordering specific performance of the assurances Unisys made" to the retirees is permissible under ERISA § 502(a) (3).

Unisys next argues that compelling it to carry out its assurances violates the ERISA principles that (1) employers have the general ability to define the terms of their plans and (2) a formal ERISA plan document should be given "primacy." These arguments have been considered and rejected by the Third Circuit. As discussed *supra,* the Third Circuit has held that Unisys permissibly could terminate the benefits of its retirees. This was in explicit recognition of Unisys's general ability to define the terms of its plans, and because of the importance of the reservation of rights provisions in the plan documents. *In re: Unisys,* 58 F.3d at 904-05, 908. However, the Third Circuit allowed claims for breach of fiduciary duty against Unisys and, if these claims were proven, suggested that equitable relief would be appropriate. *In re: Unisys,* 57 F.3d at 1269.

2. Trial Plaintiffs' Objections to the Denial of Monetary Damages

In addition to seeking an injunction forcing Unisys to resurrect the Burroughs Plan, Prevailing Plaintiffs seek recovery of back wages and pension benefits, medical premiums paid to the Unisys Plan, medical premiums paid for other medical insurance, and other losses they allegedly incurred, under a claim for restitution. They also request payment representing the amount Unisys financially gained as a result of their decision to retire.

The Magistrate Judge correctly denied these claims because they are not "appropriate equitable relief." 29 U.S.C. § 1132(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) ("*Knudson*"), the Supreme Court reaffirmed that only equitable relief may be obtained for a breach of fiduciary duty under ERISA § 502(a)(3). "Equitable relief" under § 502(a)(3) refers to "those categories of relief that were typically available in equity." *Id.* at 210 (quotations omitted). Accordingly, the question presented here is whether the restitution sought by Trial Plaintiffs typically was available in equity.

In *Knudson*, the Supreme Court held that restitution, a remedy that it previously had regarded as equitable, exists in two forms: legal restitution and equitable restitution. Only the latter form of restitution is available under § 502(a)(3)(B). *Id.* at 212-13 ("[N]ot all relief falling under the rubric of restitution is available in equity . . . [R]estitution is a legal

remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case.") (internal quotation marks and alterations omitted).

"The line separating legal from equitable [restitution] is more nice than bright." *Dastgheib v. Genentech, Inc.*, 457 F. Supp. 2d 536, 541 (E.D. Pa. 2006) (citations omitted). The distinction, according to the Supreme Court, turns on the following:

> In cases in which the plaintiff "could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution at law through an action derived from the common-law writ of assumpsit. Dobbs § 4.2(1), at 571 (2d ed. 1993) . . . In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." Restatement of Restitution § 160, Comment a, pp. 641-642 (1936).
>
> * * *
>
> In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in

> the defendant's possession. *See* Dobbs § 4.3(1), at 587-588; Restatement of Restitution, supra, § 160, Comment a, at 641-642; 1 G. Palmer, Law of Restitution § 1.4, p. 17; § 3.7, p. 262 (1978). A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been so dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Restatement of Restitution, supra, § 215, Comment a, at 867. Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Knudson, 534 U.S. at 213-14 (last three alterations in original).

Put simply, "'equitable relief' under § 502(a)(3)(B) is to be construed by reference to the types of relief typically available in equity, and courts are to analyze the underlying nature of the claim and relief requested by a plaintiff in order to determine whether that relief had been typically available in equity." *Skretvedt v. E.I. Dupont de Nemours*, 372 F.3d 193, 211 (3d Cir. 2004). Restitution typically was available

in equity "where money or property identified as belonging in good conscience to the plaintiff could *clearly* be traced to *particular* funds or property in the defendant's possession." *Knudson,* 534 U.S. at 213 (citing multiple treatises) (emphasis added).

The Magistrate Judge concluded that the restitution sought by Trial Plaintiffs could not be considered a request for equitable restitution. As the Magistrate Judge correctly noted, "Prevailing Plaintiffs' claims . . . would be paid from the general funds of Defendant and not from identifiable property held by Defendant that could be traced from Prevailing Plaintiffs to Defendant." COL ¶ 77.

In their Objections, Trial Plaintiffs acknowledge that *Knudson* sharply limited the award of money damages through equitable relief. *Knudson,* 534 U.S. at 210 ("almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff . . . [seek] legal relief") (quotations and alterations omitted). They argue, however, that the equitable remedies of "constructive trust" and "accounting for profits" permit them to recover money damages. They also argue that all relief to remedy a breach of fiduciary duty is equitable.

a. Constructive Trust

First, Trial Plaintiffs argue that they should be able to recover money damages through the remedy of a constructive trust. They argue that even if they

must trace the money they seek to a particular fund or asset in the possession of Unisys, the Magistrate Judge read this "tracing" requirement too strictly. Rather than identifying particular property, Trial Plaintiffs argue that they must "simply . . . identify in the defendant's possession 'something,'" including money, "which it would be unjust for the defendant to retain." Trial Plaintiffs' Reply Memo. in Support of Objections at 24. According to Trial Plaintiffs, once this requirement is satisfied, a plaintiff then must identify only some section of the defendant's general assets, such as a payroll account, that "benefitted" from the unjust action toward the plaintiff.

The Court disagrees. Trial Plaintiffs' view of equitable relief runs counter to the explicit language in *Knudson* that a constructive trust only can be placed on "*particular* funds or property in the defendant's possession" that are "*clearly*" traced to the plaintiff. 534 U.S. at 213 (emphasis added). Simply designating some portion of Unisys's general funds is not enough. Indeed, since they cannot identify the particular property that belongs to them, Trial Plaintiffs are seeking the same relief as every claimant who seeks monetary damages: money that they believe belongs to them. *See* Dobbs § 2.6(3), at 157 ("If no particular property is identified as belonging to plaintiff in equity and good conscience, the plaintiff's claim for money restitution looks like an ordinary claim for a money judgement.").

b. Accounting for Profits

Second, Trial Plaintiffs argue that even if the Magistrate Judge correctly found that they cannot prove an entitlement to specific funds or property in Unisys's possession, they should be awarded monetary relief through the equitable remedy of an accounting for profits. In *Knudson,* the Supreme Court did acknowledge that an accounting for profits is a form of equitable restitution that is outside the general rule that an equitable action must not seek to impose personal liability on the defendant. 534 U.S. at 214 n.2. "If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered." *Id* (citations omitted).

Before a plaintiff may account for profits, however, he must, as with a constructive trust, first identify "*particular* funds or property in the defendant's possession" that belongs in good conscience to him. *Id.* at 213 (emphasis added); *see also* Dobbs § 4.3(2), at 588 (2d ed. 1993) ("Accounting for profits carries the constructive trust idea over to cases in which the property subject to a constructive trust produces profit or income."). Thus, for example, if a plaintiff can identify a specific tract of land that has been held wrongfully and rented out by the defendant to a third party, he may seek equitable control over the property, as well as an accounting for the profits (i.e. the rent) that the defendant earned off the land.

These profits are recoverable, even if a defendant has dissipated the actual rent profits into its general funds. *Knudson,* 534 U.S. at 214 n.2.

Here, for the same reason that Trial Plaintiffs cannot claim a constructive trust, they cannot claim an accounting for profits. Plaintiffs have failed to identify a specific fund or property from which they are entitled to the profits. Therefore, an accounting for profits is not an appropriate equitable remedy in this case.

c. Equitable Relief Requires an Equitable Remedy

Finally, Trial Plaintiffs argue that they are entitled to money damages because this is a breach of fiduciary duty case, and courts of equity traditionally had the power to award any remedy, including monetary relief, in such cases. Therefore, they argue, monetary relief in a breach of fiduciary duty case is "appropriate equitable relief" under ERISA § 502(a)(3).

Trial Plaintiffs are correct that under the common law of trusts, which underlies ERISA's fiduciary provisions, "the remedies of a beneficiary against the trustee are exclusively equitable." Restatement (Second) of Trusts § 197 at 433. It does not follow, however, that all forms of relief against a fiduciary are equitable under ERISA § 502(a)(3). "There are two distinct tests for determining equitable status today. First a claim could be deemed equitable if it sought a coercive remedy. . . . Second, a

claim could be deemed equitable if the plaintiff sought to enforce a right that was originally created in the equity courts. . . ." Dobbs § 2.6(3), at 155.

The Supreme Court has held that, for purposes of ERISA § 502(a)(3), the first test, which focuses on the nature of the remedy, is determinative. *Knudson,* 534 U.S. at 219 ("[We reject] the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)."); *Mertens v. Hewitt Assoc.,* 508 U.S. 248, 257-58 (1993) ("Since all relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief not at all. We will not read the statute [this way]."). Thus, even though Trial Plaintiffs seek remedies for the breach of a fiduciary duty, the monetary relief they seek is not "appropriate equitable relief" under ERISA § 502(a)(3).

IV. Conclusion

For the reasons stated above, the parties' Objections to Magistrate Judge Rueter's Report and Recommendation will be denied and the Report and Recommendation will be approved and adopted in part and modified in part.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: UNISYS CORPORATION RETIREE MEDICAL BENEFITS ERISA LITIGATION	:	**MDL DOCKET NO. 969**
ADAIR, HARLEY, J., *et al.*	:	**CIVIL ACTION**
v.	:	**NO. 03-3924**
UNISYS CORPORATION	:	

ORDER

AND NOW, this 16th day of July, 2007, upon consideration of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter and review of the accompanying Record, and after considering the parties' Objections pursuant to Fed. R. Civ. P. 53, it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED** in part and **MODIFIED** in part.

2. Plaintiffs' request for injunctive relief is **GRANTED** as follows:

Within sixty (60) days of the date of this Order:

(a) Unisys Corporation ("Unisys") shall restore the benefits that were applicable to Plaintiffs Gallagher, Peterman, Castorani, Geneva, Stringer, Hansell, Yeager, Ginsberg,

Horshaw, Botzum, Endress and Schieman ("Prevailing Plaintiffs") under the Burroughs Post-Retirement Medical Plan (the "Burroughs Plan") before Unisys terminated the plan;

(b) Unisys and the Burroughs Plan shall be enjoined from exercising any provision of the Plan to (i) terminate the Burroughs Plan with respect to Prevailing Plaintiffs, or (ii) require Prevailing Plaintiffs to pay premiums after age sixty-five for medical coverage under the restored Burroughs Plan.

(c) Unisys shall reinstate the Burroughs Plan with these conditions or create a new plan identical to the Burroughs Plan with these conditions.

3. Judgment is hereby entered:

(a) In favor of Prevailing Plaintiffs and against Unisys on their claims; and

(b) In favor of Unisys and against Plaintiffs DiLoreto and Walnut on their claims.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE UNISYS CORPORATION RETIREE MEDICAL BENEFITS ERISA LITIGATION	MDL DOCKET NO. 969
ADAIR, HARLEY, J., et al. v. UNISYS CORPORATION	CIVIL ACTION NO. 03-3924

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

September 29, 2006

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I. INTRODUCTION

Before the court for decision are the severed claims of fourteen plaintiffs ("Trial Plaintiffs"), alleging that defendant, Unisys Corporation, breached its duties under the fiduciary provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*[1] Plaintiffs seek declaratory, injunctive and other equitable relief.

At the request of the parties, and pursuant to 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53, the Honorable Bruce W. Kauffman referred plaintiff's [sic] claims for a trial and a Report and Recommendation to this court by Order dated July 15, 2005. (Doc. No. 8.) Trial commenced on October 17, 2005 and testimony was heard through October 26, 2005. At the

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[1] The factual and procedural history of this case is extensive and has been recited in detail in prior opinions. *See In re Unisys Corp.*, 57 F.3d 1255, 1257-61 (3d Cir. 1995), *cert. denied sub nom., Unisys v. Pickering*, 517 U.S. 1103 (1996); *In re Unisys Corp.*, 2003 WL 252106, at *1-2 (E.D. Pa. Feb. 4, 2003); *In re Unisys Corp.*, 957 F. Supp. 628, 631-32 (E.D. Pa. 1997); *In re Unisys Corp.*, 837 F. Supp. 670, 672 (E.D. Pa. 1993), *aff'd*, 58 F.3d 896 (3d Cir. 1995).

request of the parties, closing arguments were presented on February 13, 2006, after the notes of testimony were transcribed.

In accordance with Fed. R. Civ. P. 53(f), the court makes the following:

II. FINDINGS OF FACT

A. Background

1. In September 1986, Sperry Corporation ("Sperry") and Burroughs Corporation ("Burroughs") merged to form Unisys Corporation (hereinafter referred to as "Unisys" or the "Company"). (N.T. 10/24/05 at 102.)

2. Prior to the merger, Sperry and Burroughs each provided their active employees and retirees with medical benefits under various benefit plans. After the merger, Unisys continued to provide the pre-merger benefits under the separately established plans. Those employees who previously worked for Burroughs received retiree medical benefits under the Burroughs plan and those employees who previously worked for Sperry were provided retiree medical benefits under the Sperry plans. Specifically, Burroughs retirees continued to receive post-retirement medical benefits under the Burroughs Post-Retirement Medical Plan. (Hereinafter the plan pursuant to which active employee medical benefits and retiree medical benefits were provided is referred

to as the "Burroughs Plan.") *See infra* Finding of Fact No. 24.

3. Unisys subsequently created a new medical benefit plan for active employees effective April 1, 1988 (the "Unisys Medical Plan"). (N.T. 10/25/05 at 187.)

4. Unisys also implemented a new Unisys Post-Retirement and Extended Disability Medical Plan for employees who retired after April 1, 1989 ("Unisys PRM Plan"). (N.T. 10/24/05 at 195-98; N.T. 10/25/05 at 187-88; Ex. D-261.) The Unisys PRM Plan had different terms and costs than both the Sperry medical plans and the Burroughs Plan.

5. By letter dated October 30, 1992, Unisys announced to participants in the Company's post-employment medical plans that the medical plans for existing retirees would be terminated and replaced by the Unisys Post-Retirement and Extended Disability Medical Plan ("Unisys Plan") effective January 1, 1993. (N.T. 10/24/05 at 225-26; Ex. P-176.) Under the Unisys Plan, retirees were responsible for increasing levels of contribution until January 1, 1996, after which time retirees were required to pay the full cost of their coverage under the plan. Under the old medical plans, in contrast, the Company subsidized most or all of the cost of premiums for retirees.

6. Presently before the court for disposition are the Trial Plaintiffs' claims that the Company breached its fiduciary duties under sections 404(a)

and 502(a)(3) of ERISA, 29 U.S.C. §§ 1104(a) and 1132(a)(3), to participants of the Burroughs Plan.

B. The Parties and Relevant Company Personnel

7. The Trial Plaintiffs are: Theodore F. Botzum, Mary Castorani, Ernestine Diloreto, Eugene and Genevieve Endress, Dennis Gallagher, Henry and Gloria Geneva, Elihu and Annalee Ginsberg, Howard and Lillian Hansell, Vernon Horshaw, Helen Peterman, Robert and Elizabeth Schieman, Ruth Stringer, Anne Walnut, and Thomas and Theresa Yeager. Anne Walnut is the surviving spouse of Francis Walnut.

8. Michael Blumenthal was the Chief Executive Officer of Burroughs and later Unisys. (N.T. 10/24/05 at 13.)

9. From the time of the merger in September 1986 through 1988, Unisys retained benefits professionals from Burroughs and Sperry in two parallel human resources organizations reporting to Senior Vice President of Human Resources Richard Bierly. The individuals who remained responsible for the Burroughs benefits plans were Thomas McKinnon, Mary Massman, Al Robbins and William Geary, while the individuals responsible for the Sperry benefits plans were Michael Losey and Thomas Penhale. (N.T. 10/25/05 at 184-86.)

10. Mr. Bierly was the highest ranking human resources executive in the Company from March 1983 through July 1988, reporting directly to the Chief Executive Officer. (N.T. 10/24/05 at 12-15.) Mr. Bierly was responsible for managing all human resources functions of the Company, including compensation, all benefit plans, employee relations, management development and employee communications. (N.T. 10/24/05 at 18.) He had two primary direct reports, Thomas McKinnon and Michael Losey. (N.T. 10/25/05 at 184.) Mr. Bierly retired from the Company in 1990. (N.T. 10/24/05 at 15.)

11. Jack Blaine replaced Mr. Bierly as Vice President of Human Resources for the Company in 1988. (N.T. 10/24/05 at 84.)

12. Michael Losey was a Vice President who oversaw Sperry benefits and programs at Sperry and Unisys. (N.T. 10/25/05 at 184.) Mr. Losey reported to Mr. Bierly. (N.T. 10/25/05 at 184.)

13. Thomas Penhale was hired by Sperry in 1974 and became the head of benefits and compensation for Sperry's Univac division in 1981. (N.T. 10/25/05 at 183.) In 1985, he was appointed staff Vice President of Sperry and was in charge of compensation programs. (N.T. 10/25/05 at 183-84.) After the merger, Mr. Penhale was appointed staff Vice President of U.S. Benefits Planning and held that position until 1995. (N.T. 10/25/05 at 184.) From September 1986 through 1988, Mr. Penhale's primary responsibilities were to oversee the Sperry benefits

programs and to lead the Sperry effort in integrating the Sperry and Burroughs benefits programs into one Unisys program. (N.T. 10/25/05 at 185.) Following the merger, Mr. Penhale reported to Mr. Losey on benefits-related issues. (N.T. 10/25/05 at 184.)

14. Mary Massman currently functions as the Director of the Company's U.S. Health and Welfare Benefits Programs and Planning and has worked in the human resources department since 1982. (N.T. 10/24/05 at 100.) Ms. Massman began in the Burroughs organization and worked on benefit plan design, communication of the benefit plans, and policies and procedures for the human resources staff and employees. (N.T. 10/24/05 at 100-01.) Prior to the merger, Ms. Massman reported to William Geary and later Al Robbins. (N.T. 10/24/05 at 102.) After the merger, Ms. Massman reported to Al Robbins and began reporting to Mr. Penhale after 1987. (N.T. 10/24/05 at 102-03.)

15. Catherine March began employment with Burroughs in 1973 as an administrative assistant in the quality assurance department. (N.T. 10/25/05 at 79.) In 1979, she transferred to the human resources department and in April 1985, she was promoted to the position of benefits coordinator in the human resources department of the Company's Tredyffrin facility. (N.T. 10/25/05 at 79-80.) From 1985 to 1988, Ms. March was the primary person responsible for employee benefits administration for the Company's Tredyffrin facility. (N.T. 10/25/05 at 80.) In October 1988, she was again promoted to a benefits manager

position in the Company's Blue Bell facility and in August 2000 she was appointed program manager for global assignments, a position she continues to hold at the present time. (N.T. 10/25/05 at 79.)

16. Eloise Phillips began working for Burroughs in March 1966 and worked in the personnel department from Fall 1966 until her retirement on March 23, 1990. (Ex. P-353 at 12-13, 18.) Part of Ms. Phillips' job responsibilities included counseling employees at the Company's Downingtown, Great Valley Labs, and Paoli facilities about their retirement benefits. (Ex. P-353 at 23, 27, 47.)

C. The Burroughs Plan

17. The Burroughs Plan was sponsored and administered by the Company and provided medical benefits to active employees and retirees and their eligible spouses and dependents. (N.T. 10/24/05 at 103.)

18. Effective October 1, 1983, Travelers Insurance prepared a group policy booklet and certificate of insurance for the Burroughs medical plan for retired employees. (N.T. 10/24/05 at 236-38; Ex. D-3.) At that time, Burroughs' group insurance policies were provided by Travelers Insurance. Burroughs later terminated the insurance policy with Travelers, but continued the Burroughs Plan by self-insuring the retiree medical benefits. (N.T. 10/24/05 at 238.)

19. In October 1983, Burroughs published a benefits portfolio entitled "Your Benefits System" (the "Benefits Portfolio") that contained summary plan descriptions ("SPDs") of various Burroughs benefit plans, such as medical, disability, life insurance, and dental. (N.T. 10/24/05 at 106-07; Ex. D-326.)

20. Included among the SPDs in the Benefits Portfolio was one that described medical benefits pursuant to the Burroughs Plan. (Ex. D-326 at SUPP20639-SUPP20651.) This SPD was updated in 1984 and again in 1985. (N.T. 10/24/05 at 109-12; Ex. D-326 at SUPP20652-SUPP20666, SUPP20667-SUPP20688.) Each of these SPDs contains a provision entitled "Retiree coverage" which explains that qualified retirees under age sixty-five may continue coverage under the Burroughs Plan by making monthly contributions and qualified retirees over age sixty-five "are covered by a group plan which supplements Medicare and is paid for by the Company." (Ex. D-326 at SUPP20641, SUPP20654, SUPP20670.)

21. The 1983, 1984, and 1985 Burroughs Plan SPDs contain reservation of rights ("ROR") provisions. *See* Ex. D-326 at SUPP20650, SUPP20663, SUPP20684. These SPDs each contain a section with the heading "When coverage ends" which provides, *inter alia*: "While the Company does not expect to do so, it necessarily reserves the right to terminate or modify the plan at any time, which will result in the termination or modification of your coverage." (Ex. D-326 at SUPP20650, SUPP20663, SUPP20684.)

22. Burroughs also published an SPD for benefits effective July 1, 1986 which was intended specifically to provide retirees with information about their post-retirement medical coverage. (N.T. 10/24/05 at 142-43; Ex. D-4.) On its cover, the booklet is entitled "Burroughs Medical Plan for Retired Employees;" however, the official name of the plan listed in this SPD is the "Burroughs Medical Plan." *See* Ex. D-4 at 36.

23. The retiree SPD also contains an ROR provision. (Ex. D-4 at 28.) The retiree SPD includes a section with the heading "When coverage ends" which provides, *inter alia*: "While the Company does not expect to do so, it necessarily reserves the right to terminate or modify the plan at any time, which will result in the termination or modification of your coverage." (Ex. D-4 at 28.)

24. Although medical benefits for Burroughs active employees and retirees were provided pursuant to the same plan with the same plan number, (N.T. 10/24/05 at 110, 139, 143-44), Burroughs at times referenced the plan covering retiree medical benefits as a separate medical plan. *See, e.g.,* Ex. P-46 at 046743 (October 1983 newsletter referencing "improvements in the retiree medical plan coverage), Ex. D-4 (the cover of the SPD that specifically addresses retiree benefits is entitled "Burroughs Medical Plan for Retired Employees"); Ex. D-36 (Bierly cover letter describing the enclosed booklet as "the Burroughs Medical Plan for retirees"); Ex. D-39 (memorandum announcing change to medical benefits for retirees

notes that prior changes to medical benefits for active employees "have not been applied to the post-retirement medical plan"); N.T. 10/25/05 at 87 (Ms. March's testimony describing the retiree SPD as "the SPD for the retiree medical plan"); N.T. 10/25/05 at 197 (Mr. Penhale's testimony describing "the post-retirement medical plans for both" Sperry and Burroughs).

25. Burroughs periodically instituted changes to the Burroughs Plan for cost-containment reasons by shifting some of the expenses from the Company to employees and retirees. (N.T. 10/24/05 at 21-23.) *See, e.g.*, Exs. D-14, D-16, D-31, D-39, D-325. For example, changes instituted in September 1983 included, *inter alia*, decreasing the plan participants' reimbursement for specific procedures and increasing individual and family deductibles. (N.T. 10/24/05 at 21-22; Ex. D-14.)

26. However, at times, Burroughs described prospective changes to the medical benefits in positive terms. (N.T. 10/24/05 at 54-55.) For example, when announcing changes to the retiree medical benefits in September 1983, the company described certain "take-aways" but at the same time announced several plan enhancements such as "expanded coverage for alternatives to inpatient hospital care," "added incentives," and "improved lifetime maximum medical coverage benefit." (N.T. 10/24/05 at 21-22; Ex. D-14 at Attachment B.) *See also* Ex. D-31 at 097241 (memorandum to U.S. employees dated May 28, 1985 describes changes as "the Burroughs Health

Advantage because they give each of us advantages as we shop for health care").

27. In addition, in announcing the Company's new hospital admission review and pre-certification program ("Call First") in a May 1985 memorandum distributed to management, Mr. Bierly described the new program as follows: "We believe these are very positive changes which provide employees with important new advantages." (Ex. D-16.) The implementation of the Call First program, however, was not well received by the Company's employee and retiree communities. (N.T. 10/24/05 at 214-16.) The Company received many complaints about the program. (N.T. 10/24/05 at 215.)

28. In November 1989, the Company distributed by first class mail a letter to retirees who were receiving medical benefits under the Burroughs Plan which announced that it was, *inter alia*, changing the participants' prescription drug coverage effective January 1, 1990. (N.T. 10/24/05 at 218-21; N.T. 10/25/05 at 206-07; Ex. D-39.) This change had the effect of increasing the cost of prescription drugs to plan participants. (N.T. 10/24/05 at 218-21; N.T. 10/25/05 at 206-07; Ex. D-39.) The Company also received complaints about the change to the prescription drug coverage. (N.T. 10/24/05 at 221.)

D. Distribution of Benefits Documentation

29. The retiree SPD was distributed to the homes of existing retirees in March 1986 and was

made available to persons considering retirement at the local human resources offices. (N.T. 10/24/05 at 40-41, 146-48; Massman Dep. at 176-77; Ex. D-36.) An individual considering retirement was given a copy of the retiree SPD upon request. (N.T. 10/24/05 at 148.) Because the Company was "never sure whether . . . [employees] had decided to come in and ask about it before they retired," if the employee enrolled in the Burroughs Plan upon retirement, human resources would send the retiree a copy of the retiree SPD. (N.T. 10/24/05 at 148-49.) Because employees at times decided not to retire after considering retirement, the Company waited until it received from the employee an enrollment form that showed the employee had actually retired and had completed paperwork to receive post-retirement medical benefits under the Burroughs Plan before mailing the retiree SPD to the retiree. (N.T. 10/24/05 at 146, 150-51.) In addition, the retiree SPD was included in information packets concerning voluntary retirement incentive packages. (N.T. 10/24/05 at 146.) The retiree SPD was also distributed to the local human resources offices so that the retiree SPD was available to employees who requested a copy. (N.T. 10/24/05 at 149.)

30. The Benefits Portfolio was sent by first class mail to the homes of active employees in October 1983. (N.T. 10/24/05 at 108.)

31. Burroughs updated the Benefits Portfolio either by distributing new, revised SPDs when there were major changes or by distributing newsletters

entitled "Your Benefit System" for minor changes. (N.T. 10/24/05 at 112, 119-20.)

32. Burroughs distributed the "Your Benefit System" newsletters by mail to the homes of employees from 1983 until 1986, prior to the merger. (N.T. 10/24/05 at 121-22, 128-38.) *See* Exs. P-46, D-26, D-29, D-357.

33. For example, a newsletter was distributed in March 1986 regarding a new medical plan booklet. (Ex. D-357.) The newsletter instructed employees, *inter alia,* to replace an obsolete benefit plan booklet with a new booklet and to insert the new booklet into the employee's Benefits Portfolio. (Ex. D-357; N.T. 10/24/05 at 123.)

34. The Your Benefit System newsletters also were distributed to the human resources staff at the time they were distributed to employees so that the staff would be able to provide new hires with the most updated information. (N.T. 10/24/05 at 136.)

35. In 1984 and 1985 Burroughs distributed by first class mail to the homes of its active employees a benefits statement that was personalized for each employee. (N.T. 10/24/05 at 158-62; Exs. D-27, D-28, D-76.) At the time the personalized annual benefits statements were distributed, the Company was emphasizing "total compensation" because it was concerned that employees considered compensation to be limited to salary. (N.T. 10/24/05 at 161.) The annual benefits statements were intended to reiterate to employees the value of the benefits the Company

offered and provided a summary of the employee's personal benefits situation, including life insurance coverage and pension amounts. (N.T. 10/24/05 at 161, 164.)

36. The personalized annual benefits statements contained a section which provided: "Although the Company intends to continue the plans described in this statement indefinitely, it cannot guarantee to do so and necessarily reserves the right to amend or terminate them at any time." (N.T. 10/24/05 at 165; Exs. D-27, D-28, D-76.)

37. The personalized annual benefits statements were produced and distributed for the years 1984 and 1985, but were no longer produced and distributed after the spring of 1986. (N.T. 10/24/05 at 231-33.)

38. In 1986, in connection with the enactment of the medical benefit continuation provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Burroughs communicated to its employees and human resources staff necessary changes to its benefits plans. (N.T. 10/24/05 at 172, 176-77.) Burroughs was required to comply with the newly enacted provisions of COBRA beginning in July 1986. (N.T. 10/24/05 at 169.)

39. In June 1986, Burroughs sent by first class mail to the homes of all employees a letter describing Burroughs' new COBRA policy and enclosed a summary of material modifications. (N.T. 10/24/05 at 176-79; Ex. D-41B.) By letter dated June 1986,

Burroughs also sent to all retirees a summary of material modifications to the Burroughs Plan. (N.T. 10/24/05 at 190-92; Ex. D-45.) In June and July 1986, Burroughs distributed to the human resources department memoranda which contained information concerning the Company's COBRA obligations when an employee's employment was terminated. (N.T. 10/24/05 at 173, 184; Exs. D-41B, D-41C.)

40. As part of its obligations under COBRA, prior to the merger, Burroughs had employees complete and execute a tri-part COBRA enrollment form when a COBRA event occurred, including retirement. (N.T. 10/24/05 at 167-68, 171; Ex. D-20.) The employee was given a copy of the form after executing it. (N.T. 10/24/05 at 171.)

41. The COBRA enrollment form contains a provision above the signature line by which the employee verifies that he has read and understood the statement of rights and conditions on the reverse side. (N.T. 10/24/05 at 169-70; Ex. D-20.) The reverse side of the form contains a provision entitled "When Coverage Ends" which states, *inter alia*: "While the Company does not presently intend to do so, it necessarily reserves the right to terminate its health plans at any time which would result in the termination of any continued coverage." (N.T. 10/24/05 at 170-71; Ex. D-20.) A provision entitled "Modification of Benefits" on the reverse side of the enrollment form also states: "Burroughs reserves the right to eliminate or modify any of the benefits offered under its health plans. Such changes will also be effective

for individuals enrolled under this continuation of coverage provision." (N.T. 10/24/05 at 171; Ex. D-20.)

42. In April 1988, Unisys began using a revised COBRA enrollment form. (N.T. 10/24/05 at 192-94; Ex. D-22.) The revised COBRA form contains an acknowledgment directly above the signature line that the employee has read the reverse side of the form. (Ex. D-22.) The reverse side of the form contains a provision which states, *inter alia*: "All provisions and limitations of the plan remain applicable. Unisys reserves the right to change or modify its group health plans. Such changes will also apply to your Continuation Coverage." (Ex. D-22.) The form also provides that coverage will end when Unisys discontinues providing any group health plan. (Ex. D-22.)

43. In order to enroll in various retirement benefit plans, employees were required to complete enrollment cards or forms. (N.T. 10/24/05 at 234-36.) The enrollment form authorized the Company to deduct from the retiree's pension "any contribution which may be required" or "the amount as may from time to time be determined." Each of the Trial Plaintiffs signed an enrollment form. (Exs. D-114 (Castorani), D-121 (DiLoreto), D-147 (Endress), D-192 (Gallagher), D-208 (Ginsberg), D-272 (Stringer), D-303 (Walnut), D-312 (Yeager), P-202 (Botzum), P-241

(Geneva), P-255 (Hansell), P-259 (Horshaw), P-262 (Peterman).)[2]

44. The Benefits Portfolio, SPDs, "Your Benefits System" newsletters, and personalized benefits statements each had a similar graphic design as a visual indicator that the documents were inter-related benefits documents. (N.T. 10/24/05 at 107-08, 120-21, 161.) *See, e.g.,* Exs. P-46, D-4, D-26, D-27, D-28, D-29, D-76, D-326, D-357.

45. It was not the Company's practice to include an ROR provision in every benefits document that was distributed to employees. (N.T. 10/24/05 at 105.) Generally, if benefits information referred to a medical plan, the Company instructed employees to "put that information with the plan and the reservation of rights was with the plan document." (N.T. 10/24/05 at 105.)

46. Burroughs also offered its employees a retirement plan ("Retirement Plan") and a 401(k) plan that was known as the "Best Plan." (N.T. 10/24/05 at 115-16.) The Retirement Plan was a vested benefit pension plan. (N.T. 10/24/05 at 116.) Burroughs reserved the right to terminate the

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[2] Although the parties did not introduce at trial an enrollment form for Trial Plaintiff Schleman, he acknowledged that he had signed various forms in connection with his enrollment in the Burroughs Plan for retirement. (N.T. 10/21/05 at 105.)

Retirement Plan and the Best Plan. (N.T. 10/24/05 at 116-18.)

E. Reduction of Staffing Levels

47. When staffing levels did not coincide with the Company's desired financial position, there were financial advantages to either laying off workers or encouraging early retirement. (N.T. 10/24/05 at 88-90.)

48. The Company could realize a financial savings if senior employees retired or were laid off because their salaries were typically higher than that of junior employees. (N.T. 10/24/05 at 90-91.)

49. Mr. Bierly, the Company's highest ranking human resources executive from March 1983 through July 1988, understood that information concerning retirement benefits is critical to an employee considering retirement. (N.T. 10/24/05 at 64.)

50. Communications to employees and retirees about benefits, including special early retirement programs and special voluntary layoff packages, were reviewed and approved by the corporate human resources headquarters. (N.T. 10/24/05 at 67-68.)

51. The Company's human resources department worked to foster the belief among employees that the Company was a good place to work. (N.T. 10/24/05 at 97.)

52. Periodically throughout the 1980s, Burroughs and, later, the Company, offered voluntary retirement incentive programs in an effort to encourage employees over age sixty to retire and to reduce the workforce. Such programs were referred to as "VRIPs" or voluntary layoff programs. (Massman Dep. at 157-58.) *See* N.T. 10/24/05 at 88. *See also, e.g.,* Exs. P-25, P-31, P-53, P-85, P-93, P-114.

53. The medical benefits offered to employees retiring pursuant to VRIPs were the same as the benefits offered to regular retirees.

54. None of the Trial Plaintiffs retired pursuant to a VRIP. (N.T. 10/24/05 at 7.) However, VRIP documentation was distributed to eligible retirees and at least some of the Trial Plaintiffs received documentation related to VRIPs held in 1986 and 1989. *See, e.g.,* N.T. 10/17/05 at 111-13 and Ex. P-85 (Mr. Gallagher received documentation related to a VRIP in 1986); Walnut Dep. at 42 and Ex. P-85 (Mr. Walnut received documentation and attended a meeting about a 1986 VRIP); N.T. 10/18/05 at 136-38 and Ex. P-85 (Mr. Geneva received documentation and attended a meeting about a 1986 VRIP); N.T. 10/19/05 at 108-09, 132-33 and Ex. P-300 (Mr. Yeager received information concerning a 1989 VRIP).

F. Creation of the Unisys Medical Plan and the Unisys PRM Plan

55. In the spring of 1988, the Company announced the implementation of the Unisys Medical

Plan, a new medical benefits plan for all *active* employees, effective April 1, 1988. (N.T. 10/25/05 at 187.) *See* Finding of Fact No. 3. Before that time, the Company maintained the preexisting, separate Burroughs and Sperry active employee medical plans. The Company did not, at that time, merge its preexisting post-retirement medical plans.

56. In its communications to employees about the Unisys Medical Plan, the Company also announced its intention to create a single retiree medical plan in 1989. (N.T. 10/25/05 at 187.)

57. Some time after April 1988, the Company began to focus on retiree medical benefits in response to changes proposed by the Financial Accounting Standards Board ("FASB") that would impact the way companies reported the costs of retiree benefits on their financial statements. (N.T. 10/25/05 at 188-89.) The proposed FASB rule would have required the Company to report as a liability on its balance sheet the entire present value of the projected cost of providing benefits over the lifetimes of retirees and their dependents. (Penhale Dep. at 95-96.) This would have the effect of substantially increasing the recorded liabilities of the Company. (Penhale Dep. at 95.) As a result, the Company began to develop plans to deal with the proposed FASB rule. (N.T. 10/25/05 at 189.) *See, e.g.*, Ex. P-130; N.T. 10/25/05 at 190-92.

58. For example, Mr. Penhale sent a memorandum dated August 23, 1988 to the Company's Benefits Committee which proposed changes to

post-retirement medical coverage for *future* retirees with an effective date of January 1, 1989. (N.T. 10/25/05 at 189, 212; Ex. P-130.) The proposed changes included a "grandfather" provision which would have permitted employees to retire with medical benefits under the existing retiree medical plans as late as June 1, 1989. (N.T. 10/25/05 at 213; Ex. P-130 at 057052.) The purpose of the extended transition period was to minimize a potentially significant exodus of retirees in a short-term period. (N.T. 10/25/05 at 213-14.) The Company considered this "grandfather" provision because it was concerned that the proposed changes to retiree medical benefits could cause a staffing problem if certain critical people chose to retire prior to the January 1, 1989 effective date of the new retiree medical plan. (N.T. 10/25/05 at 214-18.) In this August 23, 1988 draft memorandum, Mr. Penhale stated that "a change of this magnitude can tip the scale for those who were considering retirement and may accelerate their decision to do so in 1988 to take advantage of the more generous provisions of the current Plans." (Ex. P-130 at 057052.) The memorandum also acknowledges that: "[i]f communicated properly, the implementation of the new Plan can be utilized to complement the Company's manpower staffing requirements over the next several months. The potential delay and/or change to Post-Retirement Medical coverage can be a powerful motivation to certain employees who have considered retirement and/or other careers, but have not yet reached their final decisions." (Ex. P-130 at 057055.) Ms. Massman was involved in the

editing of this memorandum. (Massman Dep. at 204-05.) The proposal was ultimately sent to Mr. Blumenthal for his review and was revised to encompass changes to the then-current retirees benefits. (N.T. 10/25/05 at 192.) The Company did not implement this proposal.

59. As part of the Company's continuing effort to address the cost of retiree medical benefits under the proposed FASB rule, Mr. Penhale drafted a confidential memorandum dated December 20, 1988 for Jack Blaine, the newly-appointed Senior Vice President of Human Resources (succeeding Richard Bierly), which proposed to Unisys' Chief Executive Officer, Michael Blumenthal, certain changes to the medical benefits of current and future retirees. (N.T. 10/25/05 at 185-86, 192, 225-33; Exs. P-124, P-141, P-143.) Mr. Penhale drafted the memorandum because Mr. Blaine had an operations management background, rather than a human resources background, and depended heavily on his staff for input on benefits issues. (N.T. 10/25/05 at 192-93.) Ms. Massman and Mr. Losey also contributed to the drafting and editing of this memorandum. (N.T. 10/25/05 at 226.) The confidential memorandum was carbon copied to other Unisys executives, Curt Hessler (Vice-Chairman), Lee Level (Treasurer), Ken Miller (Secretary), and Jim Unruh (CFO). (N.T. 10/24/05 at 84; Ex. P-143.)

60. In drafting the December 20, 1988 memorandum from Mr. Blaine to Mr. Blumenthal, Mr. Penhale wanted to provide information on the

financial impact of the proposed FASB rule and to alert Mr. Blumenthal that the Company could expect an adverse reaction if changes were made to the benefits of existing retirees. (N.T. 10/25/05 at 194.) In the December 20, 1988 memorandum, Mr. Penhale wrote: "Many retirees will undoubtedly suggest that when they retired they felt their medical program would continue without change." (Ex. P-143 at 074169.) Mr. Penhale based this statement on his experience in the Sperry organization and anticipated that since Sperry had not, until that point, changed the benefits of existing retirees, there could be an adverse reaction. (N.T. 10/25/05 at 194.) However, it was possible that some of the Burroughs retirees would also contend that their medical benefits would not change during retirement. (N.T. 10/25/05 at 233.) Although he anticipated an adverse reaction, Mr. Penhale understood that the Company reserved the right to make changes to the retiree medical plans and assumed that the employees and retirees knew the same because of the existence of the ROR provision in various employee and retiree communications. (N.T. 10/25/05 at 194-95, 219.)

61. By confidential memorandum dated February 8, 1989, from Mr. Losey to "Key Human Resources Staff," Mr. Losey announced that the human resources department was beginning to disseminate information about the new Unisys PRM Plan. (Ex. P-155.) In explaining the implementation of the new plan, the memorandum notes that the Company recognized "that post-retirement medical

coverage is an important and valued benefit to employees." (Ex. P-155 at 074318.)

62. The February 1989 Losey confidential memorandum also states under the heading "Should I Retire Now":

> Because the new Unisys Post-Retirement and Extended Disability Medical Plan will require contributions greater than either of the predecessor Plans, we can anticipate that some employees may view this situation as a reason to consider retiring at this time. Obviously, if someone is seriously considering retirement at this time anyway, or if they are eligible for the VRIP, the timing of the post-retirement medical transition could influence them to retire now.
>
> However, if an employee is not seriously considering retirement prior to the announcement of the new Unisys Post-Retirement and Extended Disability Medical Plan, we should carefully caution them not to give unusual weighting to the issue now.
>
> Retirement is an important decision. Short-term influences should be cautiously evaluated. With the information shared here and planned with the introduction of the new Plan, we know you also can help employees understand that the new Plan will continue to provide meaningful health-care protection for them and their family at a reasonable cost.

(Ex. P-155 at 074320.)

63. In February 1989, the Company announced to its employees that it was implementing the new Unisys PRM Plan for employees who retired after April 1, 1989. (N.T. 10/24/05 at 195-97; Ex. D-261.)

64. The Company announced the implementation of the Unisys PRM Plan in a February 1989 memorandum from Mr. Blaine to all employees who were eligible to retire at that time. (Ex. D-261; N.T. 10/24/05 at 201-04.) The February 1989 Blaine memorandum was drafted by Mr. Penhale with contributions from Ms. Massman. (N.T. 10/24/05 at 195; N.T. 10/25/05 at 201.)

65. The February 1989 Blaine memorandum described the new Unisys PRM Plan and informed employees that those who retired after April 1, 1989 would only be eligible to participate in that plan. (N.T. 10/24/05 at 198; N.T. 10/25/05 at 201; Ex. D-261.) The memorandum further informed eligible employees that medical coverage under the Burroughs or Sperry post-retirement medical plans was available only for those who retired and began participating in the plans on or before April 1, 1989. (N.T. 10/24/05 at 198; N.T. 10/25/05 at 201-02; Ex. D-261.)

66. The February 1989 Blaine memorandum acknowledged "that post-retirement medical coverage is an important and valued benefit" and stated that the purpose of the memorandum was to provide information so that recipients could "review the differences between the Unisys [PRM] Plan and the

Sperry or Burroughs Post-Retirement Medical Plans." (Ex. D-261.)

67. The February 1989 Blaine memorandum has four attachments. Attachment 1 is a summary of the Unisys PRM Plan. The "Plan Termination/ Revision" section of Attachment 1 provides: "As with other benefit programs, the Company reserves the right to change or terminate the Unisys Post-Retirement and Extended Disability Medical Plan. Should the Plan be terminated, coverage for all participants would end." (Ex. D-261, at p. 3 of Attachment 1.)

68. Attachment 4 of the February 1989 Blaine memorandum is a comparison of the Unisys PRM Plan, the Burroughs Post-Retirement Plan and the Sperry Post-Retirement Plan. (Ex. D-261.) The comparison chart shows, *inter alia,* that premiums under the Burroughs Plan would be less than under the Unisys PRM Plan. *Compare* Ex. D-261, at p. 3 of Attachment 4 *with* Ex. D-261, at p. 1 of Attachment 2. The comparison of the various retirement medical plans in Attachment 4 does not contain a reservation of rights clause.

69. On February 14, 1989, the Company distributed an internal communication to employees via its "NEWSNET" system regarding the Unisys PRM Plan. (Ex. P-157.) This update noted "the importance of ongoing medical coverage to those who are eligible for retirement" and explained that an information package had been mailed to the homes of eligible

participants. (Ex. P-157 at 660357.) The communication reiterated that "[t]hose who begin participation for post-retirement medical coverage after April 1, 1989, will be allowed to participate only" in the Unisys PRM Plan. (Ex. P-157 at 660357.) This communication does not contain an ROR provision.

70. The Company informed employees that if they retired before the effective date of the new retiree medical plan, they could retire with medical benefits provided under the Burroughs Plan or the Sperry retirement medical benefits plans. (N.T. 10/25/05 at 213; Penhale Dep. at 78-80.) The Company wanted to give employees who were eligible for retirement the option to retire with medical benefits provided under the Burroughs Plan, the Sperry retiree medical plans, or the Unisys PRM Plan because the Company realized that the specific retiree medical plan which provided retiree medical benefits could have been a factor to some individuals considering retirement. (N.T. 10/24/05 at 200.)

71. Retiree medical benefits provided under the Unisys PRM Plan would require greater contributions on the part of the retiree and would have different coverages. (N.T. 10/24/05 at 200, 206-07.) The lower contribution levels for benefits coverage under the Burroughs or Sperry post-retirement medical plans than under the Unisys PRM Plan were a tangible benefit to an employee who retired before April 1, 1989. (N.T. 10/25/05 at 204-05.)

72. The Company was aware that employees were electing to retire by March 31, 1989 in order to receive retiree medical benefits under the Burroughs Plan or the Sperry retiree plans rather than under the new Unisys PRM Plan. *See, e.g.*, N.T. 10/25/05 at 240-41.

73. Employees who requested a pension benefit estimate in connection with retirement effective April 1, 1989, received a memorandum from Corporate Benefits Programs & Planning which attempted to closely approximate the employee's potential retirement income. (Ex. P-156.) This memorandum stated: "As you requested, enclosed is an estimate of the benefit you would receive under the Unisys Pension Plan, if you elect to retire effective April 1, 1989 to take advantage of the opportunity to enroll in the applicable Burroughs or Sperry Post-Retirement Medical Plan." (Ex. P-156.)

74. By letter dated February 8, 1989, the Company also announced a 1989 Voluntary Retirement Incentive Program (the "1989 VRIP"). (Ex. P-148, P-154; Ex. D-37.) The 1989 VRIP provided certain pension enhancements for eligible employees who chose to retire prior to March 31, 1989. The Company imposed a March 15, 1989 deadline for participation in the VRIP and noted that it was "a one-time opportunity." (Ex. P-154 at 009959.)

75. The Company mailed to the homes of eligible employees a package of information concerning the 1989 VRIP. (N.T. 10/24/05 at 208-11.) The section

"Post-Retirement Medical Plan" of the 1989 VRIP documentation notified the potential retirees that if they retired prior to April 1, 1989, they would be eligible to participate in either the respective Burroughs or Sperry post-retirement medical plans, but if they retired after April 1, 1989, they would only be eligible to participate in the Unisys PRM Plan. (N.T. 10/24/05 at 209; Ex. D-37 at 009984.) This section also informed potential participants in the 1989 VRIP: "As with other benefit programs, these provisions are subject to change in the future with respect to Plan design and contribution levels." (Ex. D-37 at 009985.)

76. In early February 1989, Mr. Blaine sent a memorandum to Unisys management about the need to reduce the Company's staffing levels and encouraged managers to post information about the 1989 VRIP. (Ex. P-151.) The memorandum also encouraged managers to meet with human resources representatives "to discuss establishing a local voluntary reduction in force program." (Ex. P-151.) Mr. Blaine informed management "[t]o the extent these steps fall short of meeting business objectives, involuntary workforce reductions may also be necessary." (Ex. P-151.)

77. The documentation dated February 1989 used to train human resources staff about the 1989 VRIP contains a section on post-retirement medical benefits. (Ex. P-153 at 101855-101867.) The materials contain a comparison of the costs to retirees of participation in the Burroughs, Sperry and Unisys

PRM medical plans, but does not mention the Company's right to increase costs or terminate the Burroughs Plan. *See id.*

78. The Company held group meetings in various locations for employees who were considering retirement prior to April 1, 1989 and who would receive retiree medical benefits under the existing retiree medical plans and retirees who would receive retiree medical benefits under the new Unisys PRM Plan. *See* Ex. P-192 (tape recording of meeting in Chicago, Illinois during which human resources representative advises employees that if they retired before the effective date of the new Unisys PRM Plan, they would secure Burroughs retiree medical benefits throughout their retirement).

G. Implementation of the Unisys Plan

79. In early 1992, then CEO James Unruh, successor to Mr. Blumenthal, approved the decision to terminate the Burroughs Plan and the Sperry plans and replace the medical benefits coverage with the Unisys Plan. (N.T. 10/25/05 at 208.)

80. In 1992, the human resources staff, including Ms. Massman, created a question and answer memorandum to assist human resources staff in answering questions from employees about the implementation of the Unisys Plan. (Ex. P-175; N.T. 10/25/05 at 66-67.) The memorandum included questions that the Company anticipated would be frequently asked by employees and also included

proposed answers. (N.T. 10/24/05 at 64.) For example, the memorandum includes the following anticipated questions: "I thought my medical coverage and contributions would stay in effect for life," "Can Unisys legally make such a change," "How can they change my benefits," "I worked for ___ for many years and they said my benefits would not change. How can they make these changes now," "How can the Company make such drastic changes to medical coverage? When I retired ___ years ago, the information the Company gave me didn't indicate that the Company could make a change like this," and "I have a letter saying my benefits wouldn't change for my lifetime. I am going to see a lawyer about keeping my current benefits." (Ex. P-175 at 057439-057440.) The prepared response to each of these questions cites the existence of the ROR clause. *See id.*

81. In November 1992, the Company announced that it was terminating the plans under which it had provided medical benefits to retirees (including the Burroughs Plan), phasing out the Company's premium subsidy over a three-year period, and replacing its plans with a plan under which retirees ultimately would pay the full cost of coverage. (N.T. 10/25/05 at 207-08.)

H. Employees' Understanding of Benefits

82. Generally, human resources staff members, as opposed to the management of the human resources department, counseled employees individually

and in groups on benefits related issues. (N.T. 10/24/05 at 48-49.)

83. Some of the Company's locations were large enough to support a human resources representative. (N.T. 10/25/05 at 22.) Human resources representatives could perform multiple human resources functions, such as employee hiring and enrollment, and processing retirements. (N.T. 10/24/05 at 246.)

84. Some of the Company's larger facilities had a human resources staff member whose primary responsibility was employee benefits administration. (N.T. 10/25/05 at 80.) Such facilities might also have human resources generalists who were supposed to refer employees to the employee benefits administrator for information regarding employee benefits. (N.T. 10/25/05 at 81.)

85. In some of the Company's smaller facilities, an administrative employee performed some of the human resources functions such as distributing forms and assisting with the completion of forms. (N.T. 10/25/05 at 22.)

86. Management of the Company assumed that employees and retirees knew of the ROR provision in the Burroughs Plan because certain benefits communications contained the ROR language. (N.T. 10/24/05 at 211-12; N.T. 10/25/05 at 92-93, 219.) Management of the Company did not ask employees or retirees if they were aware of the ROR provisions contained in the benefit plans. (N.T. 10/24/05 at 211-12; N.T. 10/25/05 at 92-93, 220.)

87. The Company recognized that retiree medical benefits were a key consideration for employees who were eligible for retirement. *See, e.g.,* Ex. D-261 (February 1989 Blaine memorandum noting post-retirement medical coverage is an important and valued benefit); N.T. 10/25/05 at 240-41 (Mr. Penhale's testimony that the Company was aware that employees were electing to retire by March 31, 1989 in order to receive benefits under the Burroughs Plan).

88. According to Mr. Bierly, the Company distributed the annual benefits statements because the Company was aware through feedback from employees and management that employees did not understand the "true benefits" and value of the "total package." (N.T. 10/24/05 at 68-69.)

89. Human resources staff received the various benefits documentation that contained ROR clauses and the Company expected the staff to read the documentation and familiarize themselves with it. (N.T. 10/24/05 at 212, 214.) However, the human resources staff was not trained specifically to instruct employees who were retiring about the ROR provisions of the benefit plans. (N.T. 10/24/05 at 211.) At least some of the training materials that were distributed to human resources staff to train them on retiree medical benefits did not mention explicitly the ROR provisions of the benefit plans. *See, e.g.,* Ex. P-51 (June 22, 1984 corporate human resources bulletin regarding retiree medical benefits under the Burroughs Plan); Ex. P-68 at p. 4 (March 20, 1985

corporate human resources bulletin updating procedures for processing retirements discusses cost structure of retiree medical coverage without reference to ROR provision of Burroughs Plan); Ex. P-74 (November 1985 "Human Resources Policies and Practice Manual-Domestic" discusses cost structure of retiree medical coverage without reference to ROR provision of Burroughs Plan).

90. The Company was aware that employees and retirees would respond to the announced changes to retiree medical benefits by questioning the Company's legal right to make such changes. *See* Ex. P-168 at 0000674 (actuarial White Paper dated July 1991 noting, *inter alia*: "It should be noted, however, that even if Unisys has the legal right to change benefits for current retirees, there is certainly a strong possibility of litigation stemming from the change; particularly in light of the historic practice of grandfathering old benefit levels."); Ex. P-175 at 057439-057440 (1992 question and answer memorandum anticipating employees' and retirees' reaction to announced changes).

I. Trial Plaintiffs

(1) Ernestine DiLoreto

91. Ernestine DiLoreto, a high school graduate, was born December 21, 1920, and is widowed. (N.T. 10/17/05 at 34-35, 39.)

92. Ms. DiLoreto worked as a pick operator at Burroughs from July 31, 1978 until December 23, 1986 when she was involuntarily laid off from employment with Burroughs. (N.T. 10/17/05 at 35, 36-37, 46-47, 64.)

93. Ms. DiLoreto's duties as a pick operator entailed light production work. (N.T. 10/17/05 at 40-42.)

94. At the end of 1986, Ms. DiLoreto was notified by human resources staff member Cheryl Davis that she would be laid off from her employment with Burroughs. (N.T. 10/17/05 at 45, 47.) Ms. DiLoreto was sixty-six years old at that time. (N.T. 10/17/05 at 64.)

95. Ms. Davis met individually with Ms. DiLoreto a week or ten days prior to her last day at Burroughs for approximately ten minutes to notify her that Ms. DiLoreto would be involuntarily laid off. (N.T. 10/17/05 at 43, 47, 64, 84-86.)

96. Ms. DiLoreto understood and believed from Ms. Davis' representations that she and her husband would receive medical benefits under the Burroughs Plan for life at no cost to them once they reached age sixty-five. (N.T. 10/17/05 at 43, 45-46.)

97. Ms. DiLoreto also discussed the cost of retiree medical benefits with her co-workers. (N.T. 10/17/05 at 44.)

98. While working at Burroughs, Ms. DiLoreto received an annual benefits statement dated

December 31, 1981. (N.T. 10/17/05 at 51; Ex. P-208.) The statement reflects the cost of the benefits Ms. DiLoreto then currently received as an employee of Burroughs. (N.T. 10/17/05 at 52-53; Ex. P-208.) Ms. DiLoreto does not recall whether she received any further annual benefits statements after 1981. (N.T. 10/17/05 at 53.)

99. Ms. DiLoreto does not remember receiving a copy of the Benefits Portfolio while she was an active employee of Burroughs. (N.T. 10/17/05 at 89-91.)

100. At the time she was laid off from Burroughs, Ms. DiLoreto and her husband received medical coverage through the Burroughs Plan. (N.T. 10/17/05 at 54.)

101. Ms. DiLoreto received from Ms. Davis a letter dated January 16, 1987 which included a summary of the status of Ms. DiLoreto's compensation and benefits. (N.T. 10/17/05 at 77; Ex. D-119.)

102. In connection with the continuation of her healthcare coverage, Ms. DiLoreto completed and executed a COBRA form dated February 5, 1987. (N.T. 10/17/05 at 64-65; Ex. D-120.) Ms. DiLoreto executed the COBRA form on February 5, 1987, but did not read the statement of rights on the reverse side of the COBRA form. (N.T. 10/17/05 at 65-68.)

103. Ms. DiLoreto also executed and completed an Enrollment for Retired Employee Group Insurance form on August 6, 1987 which authorized the Company to deduct from her pension checks the cost

of her medical benefits. (N.T. 10/17/05 at 72-73; Ex. D-121.)

104. Ms. DiLoreto testified that in the first or second week of January 1987, a female employee of Burroughs human resources department called Ms. DiLoreto and asked her to return to work at Burroughs in the Engineering Department. (N.T. 10/17/05 at 47-48, 73.) Ms. DiLoreto claims that she decided not to return to work at Burroughs because she "was assured that she would" receive medical coverage after retirement. (N.T. 10/17/05 at 48.) In addition, Ms. DiLoreto's husband had just retired and she wanted to spend time with him rather than return to work. (N.T. 10/17/05 at 48.) If she had returned to work at Burroughs, Ms. DiLoreto estimated that she would have worked for an additional three or four years. (N.T. 10/17/05 at 62.)

105. Since leaving Burroughs, Ms. DiLoreto has volunteered with a VA hospital and the Marine Corps. (N.T. 10/17/05 at 37.) From 1986 when she left Burroughs until 1993, Ms. DiLoreto enjoyed traveling and attended a family reunion in Mexico. (N.T. 10/17/05 at 38.)

106. Beginning January 1, 1996, Ms. DiLoreto left the Burroughs Plan and joined Keystone 65. (N.T. 10/17/05 at 57-59.)

107. Ms. DiLoreto and her husband were "cautious" and reduced their expenses as soon as they retired. (N.T. 10/17/05 at 56-57.) Ms. DiLoreto testified that if she had known that the cost of the

medical insurance would increase, she would have accepted the position offered in Burroughs' Engineering Department because she would have continued to earn a salary which would have helped to pay for the increased cost of medical coverage. (N.T. 10/17/05 at 54.) Ms. DiLoreto also testified that she limited her vacations after the cost of the medical insurance increased in 1994. (N.T. 10/17/05 at 57.)

108. Ms. DiLoreto delayed applying for her pension until August 1987 because she received unemployment compensation until that point. (N.T. 10/17/05 at 69.) Ms. DiLoreto's pension amount was $88.85 per month. (N.T. 10/17/05 at 48; Ex. P-338.) Ms. DiLoreto had elected to reduce her pension payments by seventy-five percent so that her husband would receive survivor benefits. (N.T. 10/17/05 at 55-56; Ex. P-213.)

(2) Dennis Gallagher

109. Dennis Gallagher, a high school graduate, was born November 14, 1930 and is a widower. (N.T. 10/17/05 at 102-03, 117.)

110. Mr. Gallagher was employed by Burroughs from September 1957 through his retirement on March 31, 1989. (N.T. 10/17/05 at 102.)

111. Mr. Gallagher voluntarily retired from Burroughs at age fifty-eight. (N.T. 10/17/05 at 107-08.) At that time, Mr. Gallagher considered his health to be good, although his wife and daughter-in-law

were in poor health. (N.T. 10/17/05 at 108.) Mr. Gallagher's wife subsequently passed away in 1999. (N.T. 10/17/05 at 117.)

112. Mr. Gallagher was first hired as a government property administrator and was promoted into contract administration, working as a contract administrator, senior contract administrator, and manager of contracts. (N.T. 10/17/05 at 104-05.) In the last years of his employment with the Company, Mr. Gallagher worked as Director of Government Contracts and was responsible for the oversight of contract negotiations with the United States government and civilian agencies. (N.T. 10/17/05 at 103, 105, 146.) In this position, he had approximately twenty employees under his supervision and traveled extensively. (N.T. 10/17/05 at 103.)

113. After retiring from Burroughs, Mr. Gallagher was employed by Tenco to work as a consultant for Burroughs from November 1989 to April 1990. (N.T. 10/17/05 at 108, 169-70.) From 1995 until January 2003, Mr. Gallagher worked part-time at Galaxy Scientific Corporation. (N.T. 10/17/05 at 109.) Mr. Gallagher was seventy-three years old at the time he left Galaxy Scientific Corporation. (N.T. 10/17/05 at 144.)

114. Mr. Gallagher was eligible to participate in the 1986 Special Voluntary Retirement Program. (N.T. 10/17/05 at 171.) Although he attended a meeting and received information about the 1986 retirement program, he decided not to participate

because he did not have sufficient savings at that time. (N.T. 10/17/05 at 110-112, 115, 171; Exs. P-85, P-230.)

115. In November 1988, Mr. Gallagher submitted a request for retirement because his wife's diabetic condition had worsened and his daughter-in-law was ill with cancer. (N.T. 10/17/05 at 116.) Mr. Gallagher contacted the human resources department for an estimate of his pension distribution at that time. (N.T. 10/17/05 at 117-18; Ex. P-231; Ex. D-189.) In response to Mr. Gallagher's request, he was given information on his pension distribution and was given information on the cost of retiree medical benefits for he and his wife under the Burroughs Plan. (N.T. 10/17/05 at 121-23.) He was told that the cost of retiree medical benefits would be $20 per month until age sixty-five, at which time he would receive medical benefits at no cost to them for life. (N.T. 10/17/05 at 123.)

116. In 1988, the Company released a document in its Paoli facility which instructed employees on the documentation that would be needed to process a retirement. (N.T. 10/17/05 at 124; Ex. P-229.) Mr. Gallagher received the instructions either from Debbie Gerber, or Leslie Avery, members of the human resources staff. (N.T. 10/17/05 at 125, 173-75.) Attachment A to the instructions sets forth the monthly costs to retirees for participation in the Burroughs Plan as, *inter alia*, $20 per month until the retiree reached age sixty-five after which time there would be no cost for the benefits. *See* Ex. P-229,

Attachment A. The cost of retiree medical care was of great importance to Mr. Gallagher given his wife's condition. (N.T. 10/17/05 at 126.) Attachment A was the most important document in the package to Mr. Gallagher. (N.T. 10/17/05 at 127.) Mr. Gallagher believed that this cost structure would last forever. (N.T. 10/17/05 at 127.)

117. On two occasions in mid-to-late 1988, Mr. Gallagher met individually with Ms. Gerber to request data on his pension distribution and retiree medical insurance coverage. (N.T. 10/17/05 at 128, 155-57.) Ms. Gerber represented to Mr. Gallagher that he could continue medical coverage under the Burroughs Plan for he and his wife at a cost of $40 per month until age sixty-five at which time there would no longer be any cost to them for retiree medical benefits. (N.T. 10/17/05 at 156.) Based on the information that Ms. Gerber gave to Mr. Gallagher at their second meeting, Mr. Gallagher analyzed his financial position to determine whether he had sufficient funds to retire at that point. (N.T. 10/17/05 at 157.)

118. Mr. Gallagher submitted a request for retirement to his supervisor but it was rejected because Mr. Gallagher was considered key personnel. (N.T. 10/17/05 at 129.)

119. Mr. Gallagher continued to work, but re-submitted his request in February 1989 when a new Vice President was appointed. (N.T. 10/17/05 at 129-30; Ex. D-187 at Exhibit 1.) Mr. Gallagher requested

voluntary layoff because of "personal problems (health) at home." (Ex. D-187 at Exhibit 1.) Mr. Gallagher did not cite to participation in the Burroughs Plan as a reason for requesting voluntary layoff because he was considered key personnel and did not think that would be considered a reasonable request to leave the Company. (N.T. 10/17/05 at 134-36.)

120. Mr. Gallagher's retirement request was accepted in March 1989. (N.T. 10/17/05 at 158-59; Ex. D-187 at Exhibit 1.)

121. Mr. Gallagher did not leave Burroughs because he disliked the work, but rather because he had other commitments in his personal life. (N.T. 10/17/05 at 107, 110.) His wife and daughter-in-law were both ill. (N.T. 10/17/05 at 116-17.)

122. Ms. Avery handled retirement requests in March 1989. (N.T. 10/17/05 at 136-37.) *See* Ex. P-232. After Mr. Gallagher's retirement request was approved, he met with Ms. Avery "quite a few times" to discuss retiree benefits and process his retirement paperwork. (N.T. 10/17/05 at 158.) Ms. Avery instructed Mr. Gallagher that upon his retirement, retiree medical benefits would cost $40 per month for he and his wife until they reached age sixty-five and warned Mr. Gallagher to ensure that his payments were received timely. (N.T. 10/17/05 at 159.)

123. Mr. Gallagher understood from Ms. Avery that he could not receive retiree medical benefits

under the Burroughs Plan if he retired after April 1, 1989. (N.T. 10/17/05 at 137-38.)

124. It was important to Mr. Gallagher that he receive retiree medical benefits under the Burroughs Plan. (N.T. 10/17/05 at 137.)

125. If he had not retired from Burroughs when he did, Mr. Gallagher would have continued to work until age sixty-two or sixty-five. (N.T. 10/17/05 at 144.)

126. In analyzing whether to retire, Mr. Gallagher considered severance, unemployment, pension amount and medical costs as a total package and felt that if any part of the package "fell apart," his financial analysis might not be sound. (N.T. 10/17/05 at 123, 139-40, 166.)

127. Mr. Gallagher knew that Burroughs could change the medical benefits provided pursuant to the Burroughs Plan, and had changed the medical benefits from time to time, but he perceived the changes to be positive. (N.T. 10/17/05 at 149, 154-55.)

128. Mr. Gallagher received the Benefits Portfolio during the course of his employment with Burroughs. (N.T. 10/17/05 at 147-48, 153.) Mr. Gallagher does not recall seeing the ROR language in the SPD in the Benefits Portfolio. (N.T. 10/17/05 at 154-55.)

129. Mr. Gallagher was not given a copy of the Burroughs Plan retiree SPD while he was an active

employee and did not receive a copy of it after he retired. (N.T. 10/17/05 at 174-75.)

130. In connection with his retirement, Mr. Gallagher received thirty-one weeks of severance pay. (N.T. 10/17/05 at 164-65.)

131. Mr. Gallagher received retiree medical benefits from the Company until January 2004 when he obtained medical coverage from AARP. (N.T. 10/17/05 at 141; Ex. P-233.) He did not leave the Unisys Plan sooner because he felt he might not be able to obtain other insurance. (N.T. 10/17/05 at 141.)

132. While living in Media, Pennsylvania, Mr. Gallagher and his wife purchased a second home in Cape May, New Jersey, then sold their Media home in 1991 and began living full time in Cape May beginning in 1993. (N.T. 10/17/05 at 142-44, 167.)

133. Mr. Gallagher executed a Post-Retirement Medical Plan Enrollment/Change Form on March 13, 1989, prior to his retirement. (N.T. 10/17/05 at 162-63; Ex. D-192.)

134. Mr. Gallagher executed a COBRA form. (Ex. D-193.)

(3) **Francis Walnut**

135. Francis Walnut was born on March 10, 1927. (N.T. 10/17/05 at 179.) Mr. Walnut is deceased and Anne S. Walnut is his surviving spouse. (N.T. 10/17/05 at 178.)

136. Mr. Walnut initially worked for Burroughs beginning in 1957 before leaving to work for other companies. (N.T. 10/17/05 at 179-80.) Mr. Walnut was rehired by Burroughs on January 13, 1969 and retired from Burroughs effective May 29, 1987. (N.T. 10/17/05 at 179, 194; Ex. P-348.) At the time he retired from Burroughs, he was a senior systems specialist. (Walnut Dep. at 7.)

137. After filing several administrative complaints against Burroughs between 1981 and 1984, Mr. Walnut filed a discrimination lawsuit against the company in 1984. (Ex. P-288 at pp. 6-10.) Mr. Walnut's lawsuit alleged that he was denied promotional opportunities due to a stuttering disability and that Burroughs retaliated against him for the administrative complaints he had filed. (Ex. P-288 at p. 10.)

138. Mr. Walnut's attorney submitted several settlement proposals to Burroughs' counsel between December 1984 and September 1986. (Exs. P-284, P-285, P-286.) By letter dated September 19, 1986, Burroughs' counsel recommended that Mr. Walnut's case be settled. (Ex. P-288.)

139. Mr. Walnut attended a meeting at Burroughs in 1986 in connection with a 1986 VRIP. (N.T. 10/17/05 at 184; Walnut Dep. at 42.) At the meeting, the human resources staff member told attendees that in retirement, retirees would receive the same medical benefits they received as employees and at age sixty-five, there would be no cost for

medical benefits. (Walnut Dep. at 42.) Mr. Walnut understood this to mean that he would have received guaranteed lifetime medical benefits if he had participated in the 1986 VRIP. (Walnut Dep. at 43.) In addition, Mr. Walnut was given a booklet that described the 1986 VRIP. (Walnut Dep. at 44; Ex. P-85.) The booklet described the retiree medical benefits as costing "$20 for yourself and $20 for your spouse and dependent who are also under 65." (Ex. P-85 at 18.) The booklet also stated that for those over age sixty-five, "there is no premium for the Medicare supplemental coverage." *Id.* The booklet does not have an ROR provision. Mr. Walnut did not participate in the 1986 VRIP. (Walnut Dep. at 42.)

140. The terms of the settlement of Mr. Walnut's lawsuit against Burroughs were agreed to in principle in April 1987. *See* Exs. P-289, P-290.

141. Mr. Walnut began a medical leave on April 27, 1987. (Ex. P-293; Walnut Dep. at 12.) Mr. Walnut did not return to work at Burroughs but instead retired effective May 29, 1987. (N.T. 10/17/05 at 191; Ex. P-348.)

142. The parties executed a Settlement Agreement on June 16, 1987 (the "Settlement Agreement"). (Ex. P-292.) Pursuant to the terms of the Settlement Agreement, Mr. Walnut was to "retire, effective on or about June 1, 1987." (Ex. P-292 at ¶ 1.) In addition, Mr. Walnut was "eligible to participate in Unisys-sponsored group health and life insurance plans in accordance with Unisys policy." (Ex. P-292 at ¶ 6.)

The Settlement Agreement also provided, *inter alia,* for a monthly annuity in the amount of $440, with a death benefit for Mr. Walnut's wife. (Ex. P-292 at ¶ 4; Walnut Dep. at 40.) The Settlement Agreement contains an integration clause which states that it contains the entire agreement of the parties. (Ex. P-292 at ¶ 14.)

143. Mr. Walnut did not recall receiving the Benefits Portfolio or the SPD for active employees' medical benefits, but felt that it was "reasonable to assume" that he had looked at various benefit plans during the course of his employment with Burroughs. (Walnut Dep. at 52-53, 54-56.)

144. Mr. Walnut received the retiree SPD in August 1987. (Walnut Dep. at 35-36.)

145. Mr. Walnut was aware that medical benefits for active employees and for retirees were provided pursuant to the same plan. (Walnut Dep. at 57.)

146. Mr. Walnut was aware that changes had been made to the Burroughs Plan during the 1980s, but he considered the changes to the plan to be insignificant. (Walnut Dep. at 57-58.)

147. On March 26, 1987, Mr. Walnut signed the Burroughs Enrollment for Retired Employee Group Insurance form. (Walnut Dep. at 34-35; Ex. D-303.)

148. Mr. Walnut also executed a COBRA form on August 14, 1987. (Ex. D-305.)

149. On December 31, 1995, Mr. Walnut left the Unisys Plan. (N.T. 10/17/05 at 196.) At that point, Mr. Walnut enrolled in Keystone 65 and Mrs. Walnut enrolled in a Blue Cross/Blue Shield plan because she was not yet sixty-five years old. (N.T. 10/17/05 at 196-97.) When Mrs. Walnut turned sixty-five in October 1996, she enrolled in the Keystone 65 medical plan. (N.T. 10/17/05 at 197.) *See* Ex. P-295.

150. Mr. and Mrs. Walnut incurred medical expenses after leaving the Unisys Plan. (N.T. 10/17/05 at 197-99; Ex. P-296.) Mr. and Mrs. Walnut paid premiums under their other insurance plans. (N.T. 10/17/05 at 199; Ex. P-297.)

(4) Helen Peterman

151. Helen M. Peterman was born December 24, 1921 and is married. (N.T. 10/18/05 at 21-22.)

152. Ms. Peterman was employed by Burroughs from January 7, 1974 until her retirement from the Company's Tredyffrin facility on December 30, 1986 at age sixty-five. (N.T. 10/18/05 at 22-23, 30, 45; Ex. P-345.)

153. At the time of her retirement, Helen Scott was Ms. Peterman's supervisor. (N.T. 10/18/05 at 24.) Ms. Peterman had a good working relationship with Ms. Scott and felt that they were "very good friends." (N.T. 10/18/05 at 26.)

154. When she began thinking about retirement in 1986, Ms. Peterman first spoke with Ms. Scott,

who made an appointment for Ms. Peterman with the human resources department. (N.T. 10/18/05 at 26-27.)

155. In the beginning of December 1986, Ms. Peterman met with a female human resources staff member whose name Ms. Peterman does not recall. (N.T. 10/18/05 at 27-28, 30.) Ms. Peterman was not familiar with this woman and had not been to human resources before that time. (N.T. 10/18/05 at 28.) At the meeting, Ms. Peterman inquired about her social security, pension and medical benefits. (N.T. 10/18/05 at 28.) Ms. Peterman was given an estimate of her social security and pension benefits and was told that her medical benefits would be for her lifetime. (N.T. 10/18/05 at 29.) At this meeting, the human resources staff member did not say anything about the Company's right to change the cost of or cancel the medical benefits. (N.T. 10/18/05 at 29-30.) Ms. Peterman did not question the human resources staff member on this point, but understood from the meeting that the medical benefits would be free for her lifetime. (N.T. 10/18/05 at 29-30, 51, 66-67.) Ms. Peterman specifically recalls the word "lifetime" being used by the human resources representative. (N.T. 10/18/05 at 66-68.) Ms. Peterman was not given any documentation by the human resources staff member at the meeting. (N.T. 10/18/05 at 45.)

156. Ms. Peterman discussed with her husband whether to retire and considered income and medical benefits. (N.T. 10/18/05 at 33.) Ms. Peterman's husband planned to retire when he turned sixty-five,

which was five months after Ms. Peterman. (N.T. 10/18/05 at 33.) The couple determined that between their two pensions they would have sufficient income and would receive medical benefits through Burroughs. (N.T. 10/18/05 at 33.)

157. Ms. Peterman does not recall receiving documentation regarding medical benefits during the course of her employment. (N.T. 10/18/05 at 62-63.)

158. Ms. Peterman's husband executed a COBRA form on December 31, 1986. (Ex. D-239.) Ms. Peterman does not recall reading the form at that time. (N.T. 10/18/05 at 60-61.)

159. On December 31, 1986, Ms. Peterman executed a Burroughs Enrollment for Retired Employee Group Insurance form. (N.T. 10/18/05 at 56-57; Ex. P-262.)

160. Ms. Peterman retired approximately thirty days after meeting with the human resources staff member. (N.T. 10/18/05 at 30.)

161. If she had known at the time that she retired that the Company had the right to change the cost of the medical benefits or that the Company was thinking of changing medical benefits, Ms. Peterman would have continued to work. (N.T. 10/18/05 at 34, 64.) She was in good health at the time of her retirement and would have worked ten more years if her health remained so. (N.T. 10/18/05 at 34.) At the time she retired, Ms. Peterman's annual salary was $16,868.80. (N.T. 10/18/05 at 32; Ex. P-263.)

162. Upon learning that Unisys was increasing the cost of retiree medical benefits in 1992, Ms. Peterman and her husband obtained medical benefits through AARP. (N.T. 10/18/05 at 35-36.)

163. Since 1993, Ms. Peterman and her husband have paid medical benefit premiums and incurred unreimbursed medical expenses. (N.T. 10/18/05 at 36-37; Ex. P-264.)

(5) Mary Castorani

164. Mary P. Castorani was born August 6, 1925. (N.T. 10/18/05 at 72.)

165. Ms. Castorani worked on the assembly line at Burroughs' Tredyffrin facility from January 6, 1975 until her retirement on April 29, 1988. (N.T. 10/18/05 at 73-74, 77; Ex. P-337.)

166. Ms. Castorani enjoyed working at Burroughs and described it as a family oriented place. (N.T. 10/18/05 at 75.) During her tenure at Burroughs, there were two attempts to unionize the workers but Ms. Castorani voted against unionization each time because she "trusted the company." (N.T. 10/18/05 at 76.)

167. Ms. Castorani was on medical leave from the Company from November 1987 until January 1988. (N.T. 10/18/05 at 76-77.) At the time she returned from medical leave, Ms. Castorani was sixty-two years old and did not have any plans to retire. (N.T. 10/18/05 at 77.)

168. Upon her return to work from medical leave, Ms. Castorani learned from her co-workers that the Company was offering a "package deal" for retirees which included severance, pension and other benefits. (N.T. 10/18/05 at 77-78.)

169. Ms. Castorani then spoke with a female human resources staff member at the Tredyffrin facility on more than one occasion to learn more about the retirement offer. (N.T. 10/18/05 at 78-79.) Ms. Castorani does not recall specifically with whom in human resources she spoke. (N.T. 10/18/05 at 78.)

170. In the meetings with the human resources representative, Ms. Castorani inquired about her pension payout and her medical benefits. (N.T. 10/18/05 at 79-80.) With regard to medical benefits, the human resources staff member told Ms. Castorani that she would contribute a certain amount for the benefits under the Burroughs Plan until age sixty-five at which time the medical benefits would be free because Medicare would pay eighty percent of the benefits and the Company would fund the balance. (N.T. 10/18/05 at 80-82.)

171. Ms. Castorani believed that she would be retired from Burroughs for the rest of her life. (N.T. 10/18/05 at 82.)

172. Ms. Castorani "may have" received documentation from the Company regarding medical benefits, but does not remember specifically seeing the Benefits Portfolio, the retiree SPD, or

personalized annual benefits statements. (N.T. 10/18/05 at 95-96.)

173. Ms. March signed the paperwork processing Ms. Castorani's retirement. (Exs. D-114, D-116.)

174. On April 29, 1988, Ms. Castorani completed a COBRA form. (N.T. 10/18/05 at 97-98; Ex. D-116.) Although she executed the form, Ms. Castorani does not remember whether she read the back of the document. (N.T. 10/18/05 at 100.)

175. On April 29, 1988 Ms. Castorani executed a Post-Retirement Medical Plan Enrollment/Change Form. (N.T. 10/18/05 at 101; Ex. D-114.) She does not remember reading the language authorizing the Company to deduct from her pension checks the cost of contributions before signing the form. (N.T. 10/18/05 at 102.)

176. Ms. Castorani received several weeks of severance pay when she retired. (N.T. 10/18/05 at 104.)

177. No one at the Company told Ms. Castorani that the costs of retiree medical benefits under the Burroughs Plan could change or that the plan could be cancelled. (N.T. 10/18/05 at 83-84.) No one at the Company told Ms. Castorani that her medical benefits could not be modified or terminated. (N.T. 10/18/05 at 102.)

178. Had she known that the Company could change the cost of medical benefits after she retired

and that the Company could terminate the Burroughs Plan, Ms. Castorani would have continued to work in order to increase her pension accrual and earn additional salary and would have looked for a full-time job with benefits after she retired. (N.T. 10/18/05 at 84-85.)

179. Ms. Castorani's decision to retire in 1988 was based, at least in part, on the representation that retiree medical benefits would be free for her lifetime after age sixty-five. (N.T. 10/18/05 at 85.)

180. After retiring, Ms. Castorani worked part-time in food-service positions. (N.T. 10/18/05 at 87.)

181. Ms. Castorani remained enrolled in the Unisys Plan until 2004 at which time she enrolled in Continental Life. (N.T. 10/18/05 at 87-88; Exs. P-205, P-206.)

(6) Henry Geneva

182. Henry J. Geneva was born January 21, 1927 and is married. (N.T. 10/18/05 at 115.)

183. Mr. Geneva was employed by Burroughs from August 20, 1956 until his retirement on December 30, 1988 at age sixty-one. (N.T. 10/18/05 at 115, 120.)

184. Mr. Geneva began his career at Burroughs as an electrical technician; his last position with the Company was as senior technician. (N.T. 10/18/05 at 120-21.) Mr. Geneva designed and developed radar

and audio systems for the Company. (N.T. 10/18/05 at 122, 128-30.)

185. In May 1984, Mr. Geneva wrote to human resources requesting information about his retirement benefits in order to project the amount of his retirement income. (N.T. 10/18/05 at 130-32; Ex. P-237.) Mr. Geneva concluded, however, that he was not in an adequate financial position to retire at that time. (N.T. 10/18/05 at 132.)

186. During 1986, Mr. Geneva received from human resources an estimate of benefits as of December 1, 1986 under a special voluntary retirement program. (N.T. 10/18/05 at 133-36; Ex. P-235.)

187. Mr. Geneva also attended a meeting in the Great Valley facility regarding the 1986 special voluntary retirement program. (N.T. 10/18/05 at 136-37.) In connection with the meeting, Mr. Geneva received written materials regarding the 1986 special voluntary retirement program, including retiree medical benefits. (N.T. 10/18/05 at 137-38; Ex. P-85.) At the meeting, the attendees were told that retiree medical costs would be $20 for the retiree and $20 for a spouse until they reached age sixty-five at which time they would go on Medicare. (N.T. 10/18/05 at 138.) Mr. Geneva understood that the no cost premiums over age sixty-five would continue for the rest of his life. (N.T. 10/18/05 at 139.)

188. In 1986, human resources provided Mr. Geneva with a memorandum that described the documentation necessary to process a retirement.

(N.T. 10/18/05 at 146; Ex. P-236 with handwritten notes ignored.) Attachment A to the memorandum lists the monthly rates for post-retirement medical benefits under the Burroughs Plan. (N.T. 10/18/05 at 149; Ex. P-236 at Attachment A.) Attachment A specifies that for retirees over sixty-five years old, there is no cost for medical benefits and for retirees under sixty-five, the cost is $20 per month for each of the retiree and a spouse. (N.T. 10/18/05 at 149-50; Ex. P-236 at Attachment A.) Mr. Geneva understood this to mean that after age sixty-five his medical benefits would be "zero dollars" for the rest of his life. (N.T. 10/18/05 at 150.)

189. In 1986, Mr. Geneva considered retirement, but again decided not to retire at that time. (N.T. 10/18/05 at 143.) He executed a form declining participation in the 1986 special voluntary retirement program. (N.T. 10/18/05 at 174; Ex. D-177.)

190. In early 1988, Mr. Geneva became ill and was hospitalized. (N.T. 10/18/05 at 143.) When he returned to work, Mr. Geneva learned from a co-worker that the Company was offering retirement with medical benefits provided under the Burroughs Plan. (N.T. 10/18/05 at 143-44.) Mr. Geneva sent a letter to a manager requesting retirement, which was approved by human resources. (N.T. 10/18/05 at 144.)

191. Mr. Geneva had planned to retire in September 1988, but was asked by management to defer his retirement for approximately one month. (N.T. 10/18/05 at 125.) He originally planned to retire

in September 1988 because he was told by Debbie Gerber of human resources that he had to retire by September 30, 1988 in order to retire with medical benefits provided under the Burroughs Plan. (N.T. 10/18/05 at 125, 144.)

192. Mr. Geneva understood that if he received retiree medical benefits under the Burroughs Plan, he would pay $40 per month until age sixty-five at which time there would be no cost to Mr. Geneva and his wife for the rest of their lives. (N.T. 10/18/05 at 126.) The cost structure of retiree medical benefits was important to Mr. Geneva. (N.T. 10/18/05 at 126.) Mr. Geneva spoke with management to ensure that he would still be eligible to retire under this structure if he deferred his retirement date as they requested. (N.T. 10/18/05 at 126.)

193. Management again approached Mr. Geneva to defer his retirement for a second time, until December 1988. (N.T. 10/18/05 at 127.) Upon inquiry by Mr. Geneva, management again assured him that he would be eligible to retire with medical benefits provided under the Burroughs Plan. (N.T. 10/18/05 at 127.) In late December 1988, management requested that Mr. Geneva further defer his retirement until March 1989, but because they were unable to obtain the appropriate authority within the Company, Mr. Geneva requested retirement effective December 30, 1988. (N.T. 10/18/05 at 128.)

194. Mr. Geneva met with Ms. Gerber on two occasions in the Paoli headquarters to review his

retirement plan. (N.T. 10/18/05 at 125, 144, 186-92.) At the first meeting, Ms. Gerber told Mr. Geneva that he and his wife would pay $40 per month for medical benefits coverage under the Burroughs Plan until age sixty-five at which time there would be no cost for the coverage. (N.T. 10/18/05 at 190-91.) In deciding that he wanted to retire, Mr. Geneva wanted to be "guaranteed that my health plan would be what they promised me at the cost they stated, $20 a month until I attained age 65, then at that point it would be zero dollars for the rest of my life." (N.T. 10/18/05 at 151.) Mr. Geneva had this concern because he knew he would be on a fixed income and hospital costs were escalating. (N.T. 10/18/05 at 151.) The dollar amount of his pension was also a consideration. (N.T. 10/18/05 at 151-52.)

195. On November 3, 1988, Mr. Geneva executed a Post-Retirement Medical Plan Enrollment/ Change Form requesting retiree medical benefits under the Burroughs Plan. (N.T. 10/18/05 at 154-55; Ex. P-241.)

196. Ms. Gerber gave Mr. Geneva a photocopy of the Burroughs Medical Plan for Retired Employees on or about November 12, 1988. (N.T. 10/18/05 at 159-60; Ex. P-240.) Mr. Geneva was given a photocopy of the plan as opposed to an original copy because the human resources staff did not have original copies of the plan. (N.T. 10/18/05 at 161.) At the time he received this photocopy of the Burroughs Plan, Mr. Geneva had already notified the Company that he had made the decision to retire. (N.T. 10/18/05 at

161.) When he received the photocopy from Ms. Gerber, Ms. Gerber confirmed to Mr. Geneva that he would be grandfathered in under the Burroughs Plan. (N.T. 10/18/05 at 161.)

197. Mr. Geneva does not recall reading the ROR provision in the Burroughs Plan and if he did read it, he is not certain that he understood it at the time. (N.T. 10/18/05 at 176-77, 179.) He did not question anyone at the Company about the ROR language. (N.T. 10/18/05 at 179.)

198. Mr. Geneva also completed a COBRA form on December 30, 1988. (Ex. D-164.)

199. Mr. Geneva received literature on health benefits during his tenure with the Company, including the Benefits Portfolio. (N.T. 10/18/05 at 180, 183, 185.) *See* Ex. D-174. He was aware of the implementation of the Call First program. (N.T. 10/18/05 at 180.)

200. At the time of his retirement, Mr. Geneva was an hourly employee and his annual salary was approximately $32,000. (N.T. 10/18/05 at 122; Ex. P-244.)

201. When he retired, Mr. Geneva received a severance payment of $19,000 and also received unemployment compensation for a time. (N.T. 10/18/05 at 153, 192; Ex. D-169.)

202. Mr. Geneva periodically worked as a consultant for the Company after his retirement. (N.T. 10/18/05 at 163-64.)

203. In 1992, Mr. Geneva received a letter that the Company would increase the cost of medical benefits for retirees. (N.T. 10/18/05 at 152-53.)

204. Beginning in 1998, Mr. Geneva and his wife were employed as members of a judicial staff in Philadelphia. (N.T. 10/18/05 at 162.) In February 2000, Mr. Geneva left the Burroughs Plan because he was provided with medical benefits as a judicial staff employee. (N.T. 10/18/05 at 165.) Mr. Geneva and wife were laid off from their positions later that year but were eligible to remain in that medical plan. (N.T. 10/18/05 at 166.) Mr. Geneva contacted Unisys in an attempt to obtain coverage under the Unisys Plan and was admitted, but his wife was not permitted to re-enter the Unisys Plan because of her medical condition. (N.T. 10/18/05 at 166-67.) Mr. Geneva obtained other medical coverage for his wife. (N.T. 10/18/05 at 167.)

205. Beginning in February 2001, Mr. Geneva worked for six months in the supply room for the Board of Registrations. (N.T. 10/18/05 at 164.) Mr. Geneva currently works in security for Comcast Spectacor. (N.T. 10/18/05 at 165.)

206. Mr. Geneva retired at the time he did because he wanted to be guaranteed that the cost of his medical benefits in retirement would be as the Company had represented, $20 per month until age sixty-five and then free for the rest of his life. (N.T. 10/18/05 at 151.) Had Mr. Geneva known that he would incur the costs he has incurred since leaving

the Burroughs Plan, he would not have retired when he did, he would have continued working until age sixty-five, and he would have continued contributing to his retirement savings plan. (N.T. 10/18/05 at 168.) If he had known that his medical benefits could change after his retirement, it would have influenced the timing of his retirement. (N.T. 10/18/05 at 196.)

207. In order to work as members of the judicial staff, Mr. Geneva and his wife were required to maintain residency in Philadelphia. (N.T. 10/18/05 at 168-69.) To do so, he purchased a home in Philadelphia. (N.T. 10/18/05 at 169.) He has difficulty meeting his financial costs on a monthly basis and at times has difficulty paying for his wife's medication. (N.T. 10/18/05 at 169, 173.)

208. After his retirement, Mr. Geneva attended the Super Bowl from 1989 through 1991 and in 1993. (N.T. 10/18/05 at 172, 193-94.) Had he known that he would have to pay the cost of the medical premiums that he has paid, Mr. Geneva would have spent his money "more wisely and I probably would not have attended the Super Bowls." (N.T. 10/18/05 at 172.)

209. Mr. Geneva currently pays premiums for medical insurance for he and his wife. (N.T. 10/18/05 at 153, 167; Ex. P-246.)

210. Mr. Geneva and his wife have incurred unreimbursed prescription drug costs since leaving the Unisys Plan. (Ex. P-245.)

(7) **Ruth Stringer**

211. Ruth Stringer, a high school graduate, was born January 9, 1926 and is a widow. (N.T. 10/19/05 at 4-5, 8.)

212. Ms. Stringer was employed by Burroughs from October 31, 1966 until her retirement on July 29, 1988 at age sixty-two. (N.T. 10/19/05 at 10-12, 18, 21.) Ms. Stringer worked at the Company's Downingtown facility wiring P.C. boards. (N.T. 10/19/05 at 10-12.)

213. Ms. Stringer was eligible to participate in a 1986 VRIP, but declined participation. (N.T. 10/19/05 at 15-16; Ex. P-278.) Ms. Stringer was aware that in connection with that program, retirees would receive medical benefits at a cost of $20 per month until age sixty-five at which time the benefits would be provided for no cost to the retiree for life. (N.T. 10/19/05 at 15.) Ms. Stringer did not retire in 1986 because she "wasn't quite ready to retire yet" and her husband had recently lost his job. (N.T. 10/19/05 at 16.) The couple's medical benefits were provided through her employment and they were not in an adequate financial position for her to retire. (N.T. 10/19/05 at 17.)

214. By memorandum dated June 10, 1988, Ms. Stringer requested that the Company begin processing her retirement. (N.T. 10/19/05 at 18; Ex. D-271.) At the time she wrote the memorandum, Ms. Stringer understood that she would receive medical benefits at a cost of $20 per month until age

sixty-five, at which time there would be no cost for medical benefits. (N.T. 10/19/05 at 19-20.) Her understanding was based on a conversation she had with a female human resources representative who told her that she "would get my benefits the same as I had had them right along, except you know, you would pay the $20 per person until I retired and then it would be free." (N.T. 10/19/05 at 19-20.) Ms. Stringer "had a lot of confidence in the Company" and believed the human resources staff member's statement. (N.T. 10/19/05 at 24.)

215. At the time she submitted her retirement request, Ms. Stringer was unsure what her monthly pension would be and wanted to speak with human resources to obtain this information and information regarding her retirement savings account. (N.T. 10/19/05 at 21-22.) Ms. Stringer also sought information on her medical benefits because it was an important component of her retirement decision. (N.T. 10/19/05 at 22.)

216. Ms. Stringer recalls five or six group meetings that the Company held regarding retirement benefits. (N.T. 10/19/05 at 23.) At one meeting, they discussed giving the employees a raise rather than the medical benefits, but the employees voted against this option. (N.T. 10/19/05 at 23.)

217. On June 8, 1988, Ms. Stringer executed a Post-Retirement Medical Plan Enrollment/Change Form. (Ex. D-272.)

218. On June 8, 1988, Ms. Stringer executed a COBRA form. (Ex. D-273.)

219. Ms. Stringer received a letter dated July 8, 1988 which enclosed papers to process her retirement. Attachment A to the letter set forth the costs of retiree medical benefits under the Burroughs Plan as $20 per month for the retiree until age sixty-five, after which time there would be no cost for the benefits. (N.T. 10/19/05 at 27; Ex. P-279.) Ms. Stringer does not recall receiving the letter, but she does recall seeing the letter some time during her retirement. (N.T. 10/19/05 at 27; Ex. P-279.)

220. Ms. Stringer has not worked since her retirement. (N.T. 10/19/05 at 28.)

221. Ms. Stringer's annual salary at the time she retired was $22,000 and her monthly pension distribution is $386.01. (N.T. 10/19/05 at 28.)

222. Had she known that her medical benefits upon retirement could be changed, Ms. Stringer would not have retired because she would not have been able to afford medical benefits. (N.T. 10/19/05 at 25.) She would have continued working at Burroughs until age sixty-five. (N.T. 10/19/05 at 31.) In addition, she would not have given her granddaughter a gift of $14,000 to assist with the purchase of a home and would not have installed a swimming pool at her home had she known the Burroughs Plan was going to change and she would have had to pay premiums. (N.T. 10/19/05 at 31-32.) Because of the increasing

cost of the Burroughs Plan, she reduced her expenses. (N.T. 10/19/05 at 32.)

223. Ms. Stringer withdrew from the Burroughs Plan and enrolled in a Keystone HMO because the costs of the Burroughs Plan were too high. (N.T. 10/19/05 at 29.) Ms. Stringer has paid premiums, co-pays and deductibles to Keystone, for which she has not been reimbursed. (N.T. 10/19/05 at 29-30, 34; Ex. P-282.)

(8) Howard Hansell

224. Howard Hansell was born August 15, 1926 and is married.

225. Mr. Hansell retired from Burroughs on March 31, 1989 at age sixty-two pursuant to a voluntary layoff program. (N.T. 10/19/05 at 40-41, 55.)

226. Mr. Hansell is a high school graduate and also attended Manhattan Technical Institute and Drexel University. (N.T. 10/19/05 at 38-39.) Mr. Hansell first worked at Burroughs as a contractor for eight months in 1957, employed by Machine and Tool Designing Company. (N.T. 10/19/05 at 40.) In November 1957, Mr. Hansell began employment directly with Burroughs in their Great Valley facility. (N.T. 10/19/05 at 40-41.) His last position with Burroughs was as senior electrical mechanical designer. (N.T. 10/19/05 at 41.)

227. In the period 1983 to 1984, Mr. Hansell had several conversations with his supervisors

Mr. Depietropaolo and Mr. Hess regarding the Burroughs Plan. (N.T. 10/19/05 at 64-65.) Mr. Hansell was told that participation in the plan cost retirees $20 per month until age sixty-five at which time there was no cost for participation and "it would be free for lifetime." (N.T. 10/19/05 at 64.)

228. In 1986, Mr. Hansell began to analyze his financial situation to determine whether he could retire at that point. (N.T. 10/19/05 at 46-47.) He attended a meeting for potential retirees and he spoke with his supervisor, Mr. Depietropaolo, on several occasions about the cost of retiree medical benefits. (N.T. 10/19/05 at 46-47.) Mr. Hansell also spoke with several co-workers about retirement. (N.T. 10/19/05 at 47.) He and his co-workers were in agreement that retiree medical benefits would cost $20 per month and would be free after age sixty-five. (N.T. 10/19/05 at 47.) Based upon his review of his financial situation, Mr. Hansell decided not to retire in 1986 at age fifty-nine. (N.T. 10/19/05 at 48.)

229. In 1988, Mr. Hansell again considered retirement and attended a meeting for potential retirees which was held at the Company's Paoli facility. (N.T. 10/19/05 at 48.)

230. Sometime in late 1988 or early 1989, Mr. Hansell met with Angelo Bellis, the head of human resources at the Company's Devon facility, to obtain information about his retirement benefits. (N.T. 10/19/05 at 49.)

231. Mr. Hansell submitted a Voluntary Request for Layoff Consideration dated February 17, 1989. (N.T. 10/19/05 at 50; Ex. P-254.) After submitting this form, Mr. Hansell met with human resources to determine what his retirement benefits would be. (N.T. 10/19/05 at 52.)

232. Mr. Hansell executed a Post-Retirement Medical Plan Enrollment Change Form dated March 5, 1989. (N.T. 10/19/05 at 52-53; Ex. P-255.) Pursuant to this form, Mr. Hansell elected to enroll he and his wife in the Burroughs Plan. (N.T. 10/19/05 at 53-54.)

233. Mr. Hansell executed a form dated March 5, 1989 electing not to enroll in the Voluntary Retirement Incentive Program because he was not interested in the pension enhancement aspect of that program. (N.T. 10/19/05 at 54; Ex. P-253.)

234. Mr. Hansell retired at the time he did because he "heard there was going to be a big change coming with the Unisys Medical Plan. And if I went out at the end of March, that was another reason to leave because I would have the Burroughs Plan of the $20 a month, plus when you become 65, you would be on social security and you would be free for the lifetime." (N.T. 10/19/05 at 55.)

235. Mr. Hansell participated in the savings plan at Burroughs. (N.T. 10/19/05 at 44-45.)

236. Mr. Hansell's annual salary at the time of his retirement was $36,000. (N.T. 10/19/05 at 43-44.)

237. After Mr. Hansell retired from Burroughs in March 1989, he worked as a contractor for Tenco Corporation and Star Design Corporation for three years and ceased working at age sixty-five. (N.T. 10/19/05 55-57, 74.)

238. After his retirement from Burroughs, Mr. Hansell received a letter dated April 18, 1989 which was signed by Heidi Kreider, Supervisor, Benefits. (N.T. 10/19/05 at 58, 66; Ex. P-256.) With this letter, Mr. Hansell received a photocopy of the Burroughs Plan for Retired Employees, the retiree SPD. (N.T. 10/19/05 at 59, 67-68.) Before receiving the letter with attachments from Ms. Kreider, Mr. Hansell had not received a copy of the retiree SPD. (N.T. 10/19/05 at 59, 68.)

239. No one at the Company told Mr. Hansell that Unisys could not change or terminate his medical benefits after retirement. (N.T. 10/19/05 at 70-71.) No one at the Company ever talked to Mr. Hansell about the Company's right to change the cost of the Burroughs Plan. (N.T. 10/19/05 at 82.)

240. While he was an active employee, Mr. Hansell knew that the Company had changed the medical plan on occasion. (N.T. 10/19/05 at 71.)

241. Mr. Hansell was unable to recall whether he received materials that described his medical benefits, such as the Benefits Portfolio, while he was an active employee. (N.T. 10/19/05 at 71-72.)

242. In connection with his retirement, Mr. Hansell received one week of severance pay for every year that he worked, which amounted to thirty-one weeks of severance pay. (N.T. 10/19/05 at 73-74.) The receipt of the severance payment was also a consideration in Mr. Hansell's decision to volunteer for layoff. (N.T. 10/19/05 at 74.)

243. Mr. Hansell and his wife are still enrolled in the Unisys Plan. (N.T. 10/19/05 at 61.)

244. Had he known that participation in the Unisys Plan would cost him $700 per month, Mr. Hansell would not have retired when he did and would have continued working at Burroughs until age sixty-five. (N.T. 10/19/05 at 57, 63-64.)

(9) Thomas Yeager

245. Thomas W. Yeager was born on September 19, 1926 and is married. (N.T. 10/19/05 at 89-90.)

246. Mr. Yeager was employed by Burroughs from October 10, 1955 until he voluntarily retired from the Company's Tredyffrin facility on March 31, 1989 at age sixty-two. (N.T. 10/19/05 at 90-91; Exs. P-301, P-349.)

247. Mr. Yeager is a high school graduate and also took night courses in drafting at Temple University. (N.T. 10/19/05 at 93, 95.) Mr. Yeager began working at Burroughs in the engineering records department and transferred into the drafting

department after he completed the drafting coursework. (N.T. 10/19/05 at 95-96.)

248. In the early to mid 1980s, Mr. Yeager worked with a financial advisor to begin planning for retirement. (N.T. 10/19/05 at 98.) At the time he formulated his retirement plan, Mr. Yeager planned to work until age sixty-five. (N.T. 10/19/05 at 99.)

249. At age sixty, Mr. Yeager declined an early retirement offer, but submitted a voluntary request for layoff consideration in early 1989 which resulted in his retirement at age sixty-two. The incentives that were offered made it financially feasible for Mr. Yeager to retire at that time. (N.T. 10/19/05 at 99; Ex. P-302.)

250. Mr. Yeager first heard about the voluntary layoff program when the Company posted notices on bulletin boards advising interested employees to contact human resources. (N.T. 10/19/05 at 99.) The notices advised employees that they had to retire by the end of March 1989 in order to receive retiree medical benefits under the Burroughs Plan. (N.T. 10/19/05 at 106.) Employees who retired after March 31, 1989 would receive retiree medical benefits under the Unisys PRM Plan. (N.T. 10/19/05 at 106.)

251. In response to the bulletin board notices, Mr. Yeager contacted human resources and was directed to Janice Schoedler who was his advisor for retirement planning. (N.T. 10/19/05 at 100.)

252. Mr. Yeager met with Ms. Schoedler in January and February 1989. (N.T. 10/19/05 at 100.) At the first meeting, Mr. Yeager asked Ms. Schoedler about the retirement packages being offered and Ms. Schoedler reviewed the medical plan and the retirement package benefits. (N.T. 10/19/05 at 101.) Ms. Schoedler told Mr. Yeager that the cost of retiree medical benefits under the Burroughs Plan would be $20 per month until he reached age sixty-five, at which time there would be no charge for the medical benefits for the rest of his retirement. (N.T. 10/19/05 at 101.) Ms. Schoedler also told Mr. Yeager that he had to retire by the end of March 1989 in order to receive retiree medical benefits under the Burroughs Plan. (N.T. 10/19/05 at 106.)

253. Participation in the Burroughs Plan was the most significant factor in Mr. Yeager's decision to retire at that time. (N.T. 10/19/05 at 103, 114.)

254. Mr. Yeager met with Ms. Schoedler on another occasion to fill out the forms needed to process his request to participate in the voluntary layoff program. (N.T. 10/19/05 at 102.) Mr. Yeager submitted a request for voluntary layoff on February 17, 1989. (N.T. 10/19/05 at 103; Ex. P-302.)

255. In deciding to retire under the Burroughs Plan as opposed to the Unisys PRM Plan, Mr. Yeager referred to a document that contained a chart that compared the Burroughs Plan, the Sperry Plan and the Unisys PRM Plan. (N.T. 10/19/05 at 111-12.) Mr. Yeager received the February 1989 memorandum

from Mr. Blaine which described the new Unisys PRM Plan and contained four attachments, including a comparison of the Unisys PRM Plan, the Burroughs Post-Retirement Plan and the Sperry Post-Retirement Plan. (N.T. 10/19/05 at 125-31; Ex. D-311.)

256. Mr. Yeager received from the Company a letter dated March 8, 1989 which enclosed paperwork regarding his retirement effective March 31, 1989. (N.T. 10/19/05 at 112; Ex. P-304.) Attachment A to the letter set forth the costs for retiree medical benefits under the Burroughs Plan. (N.T. 10/19/05 at 113; Ex. P-304 at Attachment A.) Pursuant to Attachment A, retiree medical costs under the Burroughs Plan are $20 per month until the retiree reaches age sixty-five at which time the cost is $0. (Ex. P-304 at Attachment A.)

257. Mr. Yeager elected to receive retiree medical benefits under the Burroughs Plan by executing a Post-Retirement Medical Plan Enrollment/Change Form on March 21, 1989. (N.T. 10/19/05 at 123; Ex. P-305.) By doing so, Mr. Yeager authorized the Company to withhold from his pension checks amounts required under the medical plan. (N.T. 10/19/05 at 123-24; Ex. P-305.)

258. Mr. Yeager also executed a COBRA form on March 21, 1989. (N.T. 10/19/05 at 124; Ex. D-310.)

259. By a [sic] executing a form dated March 31, 1989, Mr. Yeager declined an offer to participate in the Unisys Voluntary Retirement Incentive Program.

(N.T. 10/19/05 at 108-09; Ex. P-300.) Mr. Yeager had already elected to participate in the voluntary layoff program and retire with medical benefits to be provided under the Burroughs Plan. *See supra* Finding of Fact No. 257 and Ex. P-302. By executing the document declining participation in the Unisys Voluntary Retirement Incentive Program, Mr. Yeager represented that he had reviewed the terms of the Unisys Voluntary Retirement Incentive Program. (N.T. 10/19/05 at 132-33; Ex. P-300.)

260. During his employment with the Company, Mr. Yeager received documents that described the Burroughs Plan, but he is not certain if he received all of the documents, including the Benefits Portfolio. (N.T. 10/19/05 at 122-23.)

261. As an active employee, Mr. Yeager was aware that the Company had made occasional changes to medical benefits. (N.T. 10/19/05 at 121.)

262. Had he known that the Company had the right to change or terminate the Burroughs Plan at any time, Mr. Yeager would have worked until age sixty-five. (N.T. 10/19/05 at 115.) At age sixty-two when he retired, Mr. Yeager's health was good and there was no health reason that would have prevented him from continuing to work. (N.T. 10/19/05 at 115.)

263. Mr. Yeager's wife worked for the Commonwealth of Pennsylvania and retired one year after her husband retired. (N.T. 10/19/05 at 115-16.) If they had known that the Company had the right to change or

terminate the medical plan, Mr. Yeager's wife would have continued to work. (N.T. 10/19/05 at 116.) Mr. Yeager's wife passed away in November 1994. (N.T. 10/19/05 at 116.)

264. Mr. Yeager remained enrolled in the Unisys Plan until the end of 1994. (N.T. 10/19/05 at 116.) At that time, he was eligible for COBRA coverage under his late wife's medical plan; he enrolled in that plan. (N.T. 10/19/05 at 117.) At the end of the COBRA period, Mr. Yeager enrolled in Keystone 65. (N.T. 10/19/05 at 117.)

265. Mr. Yeager has incurred costs in the form of premiums, co-pays, medical treatment expenses and prescription drug expenses while enrolled in another medical benefit plan. (N.T. 10/19/05 at 117; Exs. P-307, P-308.) Mr. Yeager was not reimbursed by any insurance company for these expenditures. (N.T. 10/19/05 at 119.)

266. During his employment with the Company, Mr. Yeager participated in the Company's savings plan and would have continued contributing to and participating in this plan had he continued employment with the Company until age sixty-five. (N.T. 10/19/05 at 118-19.)

267. At the time of his retirement, Mr. Yeager received one week's pay for every year that he worked at Burroughs. (N.T. 10/19/05 at 92.) This amounted to thirty-three weeks of severance pay. (N.T. 10/19/05 at 92.)

(10) Elihu Ginsberg

268. Elihu Ginsberg was born on February 13, 1927 and is married. (N.T. 10/20/05 at 4.) Mr. Ginsberg is a college graduate with a degree in electrical engineering. (N.T. 10/20/05 at 8-9.)

269. Mr. Ginsberg worked at Burroughs from June 13, 1955 until March 1960. (N.T. 10/20/05 at 10-12.) Mr. Ginsberg subsequently was employed by Burroughs from March 5, 1973 until his retirement on September 30, 1988. (N.T. 10/20/05 at 12-14; Ex. P-342.)

270. Five years prior to retiring, Mr. Ginsberg analyzed his personal finances to determine whether he had sufficient funds to retire. (N.T. 10/20/05 at 15.) At that time, he concluded that he did not and made an attempt to change positions so that he could earn a higher salary. (N.T. 10/20/05 at 15-17; Ex. P-247 (attachments only).)

271. In 1988, Mr. Ginsberg began to consider retirement after a meeting that his supervisor, Gerry Whalen, held for his staff. (N.T. 10/20/05 at 23, 44.) Mr. Whalen announced a voluntary layoff program pursuant to which the Company would provide a lump sum severance payment and retiree medical benefits under the Burroughs Plan, with the retiree to pay premiums until age sixty-five, at which time the medical benefits would be free to the retiree. (N.T. 10/20/05 at 24.)

272. After the meeting with Mr. Whalen, Eloise Phillips confirmed to Mr. Ginsberg the terms of the voluntary layoff program as described by Mr. Whelan, that retiree medical benefits under the Burroughs Plan would be free of premiums after they were eligible for Medicare. (N.T. 10/20/05 at 24.) Mr. Ginsberg asked for written information regarding the Burroughs Plan, but was told by Ms. Phillips that the information was out of print. (N.T. 10/20/05 at 25-26, 45.) Mr. Ginsberg sought this information because he had been participating in an HMO plan, not the Burroughs Plan, and was unfamiliar with the Burroughs Plan. (N.T. 10/20/05 at 25.)

273. Mr. Ginsberg also attended meetings about medical benefits, but the meetings addressed benefits provided under the Unisys PRM Plan, not the Burroughs Plan and he was referred to human resources to obtain a copy of the Burroughs Plan. (N.T. 10/20/05 at 26, 46.)

274. Mr. Ginsberg eventually obtained a copy of the Burroughs Plan retiree SPD from a co-worker and showed it to Ms. Phillips who confirmed that the Burroughs Plan would be the plan that applied to him if he elected participation in it during retirement. (N.T. 10/20/05 at 26-27, 45; Ex. D-214.) Mr. Ginsberg reviewed selected sections of his copy of the retiree SPD, focusing on a flow chart because it "tells you everything you want to know about what the benefits are." (N.T. 10/20/05 at 28.) He did not review the section entitled "When Coverage Ends." (N.T. 10/20/05 at 29.) Had he reviewed the ROR clause,

Mr. Ginsberg would not have volunteered for the layoff program and he would have kept working. (N.T. 10/20/05 at 53-54.)

275. Debbie Gerber from human resources in Paoli requested a copy of the Burroughs Plan in Mr. Ginsberg's possession. (N.T. 10/20/05 at 27, 29-30, 47.) Before lending it to Ms. Gerber, Mr. Ginsberg stamped his name on the copy. (N.T. 10/20/05 at 26-27.)

276. The co-worker who had lent Mr. Ginsberg the medical plan booklet eventually asked Mr. Ginsberg to return it. (N.T. 10/20/05 at 30.) Mr. Ginsberg then made photocopies of the "pertinent sheets" and returned the booklet to his co-worker. (N.T. 10/20/05 at 30.)

277. Mr. Ginsberg decided to participate in the voluntary layoff program based on the fact that there would be a Burroughs Plan and that it would be free after the participants were eligible for Medicare. (N.T. 10/20/05 at 30.) He communicated this decision by completing a form and submitting it to Mr. Whelan on June 27, 1988. (N.T. 10/20/05 at 30-31, 48.)

278. Mr. Ginsberg was subsequently told by the human resources department that he would have to leave as of September 30, 1988 in order to receive retiree medical benefits under the Burroughs Plan and begin collecting his pension on October 1, 1988. (N.T. 10/20/05 at 31.) Mr. Ginsberg had planned on retiring from his position and finding another position within the Company, but thought that he

would have until the end of the year to do so. (N.T. 10/20/05 at 32-33.) Because he had to leave his then current position as of September 30, 1988, he felt that he did not have sufficient time to find another position within the Company and instead focused on maximizing his pension. (N.T. 10/20/05 at 33.)

279. Mr. Ginsberg sought further information on his pension from the Company's Detroit offices. (N.T. 10/20/05 at 33-34.)

280. Mr. Ginsberg met with Ms. Gerber on August 18, 1988 and completed a HMO Enrollment Change Authorization Form pursuant to which he cancelled his participation in the HMO plan so that he could enroll in the Burroughs Plan. (N.T. 10/20/05 at 34-35; Ex. P-250.)

281. On the same date, August 18, 1988, Mr. Ginsberg executed a Post-Retirement Medical Plan Enrollment/Change Form pursuant to which he enrolled he and his wife in the Burroughs Plan. (N.T. 10/20/05 at 35-36; Ex. P-249.)

282. Mr. Ginsberg also executed a COBRA form on August 18, 1988. (Ex. D-204.)

283. It was important to Mr. Ginsberg that he enroll in the Burroughs Plan as opposed to the Unisys PRM Plan, because the Unisys PRM Plan was "certainly worse, certainly not as good as the Burroughs Plan." (N.T. 10/20/05 at 36.) There was a greater cost for the Unisys PRM Plan. (N.T. 10/20/05 at 37.) Mr. Ginsberg understood that the Burroughs

Plan would cost $20 per month until he went on Medicare. (N.T. 10/20/05 at 37.)

284. Mr. Ginsberg "probably" received a version of the Benefits Portfolio while an active employee, but he is unsure whether he read the documents. (N.T. 10/20/05 at 55.) He recalls receiving personalized annual benefits statements. (N.T. 10/20/05 at 56.)

285. Mr. Ginsberg was aware that while he was an active employee the Company increased the contribution he had to pay for participation in the HMO. (N.T. 10/20/05 at 56.)

286. If he had known that the Company reserved the right to terminate or modify the Burroughs Plan at any time, Mr. Ginsberg would not have volunteered for the voluntary layoff program. (N.T. 10/20/05 at 53.)

287. In connection with his retirement, Mr. Ginsberg received a lump sum severance payment in the amount of twenty-one or twenty-two weeks of salary. (N.T. 10/20/05 at 59.) Such payment was also a significant factor in Mr. Ginsberg's decision to retire. (N.T. 10/20/05 at 60.)

288. At the time of retirement, Mr. Ginsberg's health was good and he was able to continue working. (N.T. 10/20/05 at 41.) Had he known in 1988 that his medical insurance costs would be what they currently are, Mr. Ginsberg would not have retired when he did and would have kept working and trying to improve his position within the Company. (N.T. 10/20/05 at

38.) Mr. Ginsberg does not know when he would have stopped working because he "didn't think that he could stop working" and was concerned about having enough money that he could retire at some time. (N.T. 10/20/05 at 38-39.)

289. After leaving the Company, Mr. Ginsberg worked as a cantor in a synagogue for four or five years. (N.T. 10/20/05 at 39.) This position was full-time but did not provide benefits, only "parsonage and payment." (N.T. 10/20/05 at 39.) Since he stopped work as a cantor, Mr. Ginsberg has not done any other work for pay. (N.T. 10/20/05 at 42.) Mr. Ginsberg has been active in charities and his synagogue. (N.T. 10/20/05 at 5.)

(11) **Vernon Horshaw**

290. Vernon Horshaw was born June 21, 1923. (Ex. P-344.)

291. Mr. Horshaw served in the United States Army and Air Force for a total of twenty-three years. (N.T. 10/20/05 at 66.)

292. Mr. Horshaw was hired at Burroughs on January 25, 1965 and retired on June 30, 1988 at age sixty-five. (N.T. 10/20/05 at 67-68; Ex. P-344.) His last position at Burroughs was as a photo typesetter. (N.T. 10/20/05 at 68.)

293. By a form he executed on October 23, 1986, Mr. Horshaw declined participation in a 1986 Special

Voluntary Retirement Program. (N.T. 10/20/05 at 69-70; Ex. P-258.)

294. Mr. Horshaw understood that when he retired from Burroughs he would receive free medical benefits for his lifetime. (N.T. 10/20/05 at 71.) He believed that Burroughs employees were not paid as much as employees at other companies, but they were given free lifetime medical benefits in exchange. (N.T. 10/20/05 at 71.) He considered the free lifetime medical benefits to be a "carrot." (N.T. 10/20/05 at 71.)

295. By letter dated May 31, 1988, Mr. Horshaw requested that his retirement be processed effective June 30, 1988. (Ex. P-260.) In connection with making this retirement request, Mr. Horshaw spoke with human resources staff member, Marie Blount, on two or three occasions regarding his medical benefits. (N.T. 10/20/05 at 76, 78, 81-85.) Mr. Horshaw understood from his conversations with Ms. Blount that he would receive free lifetime medical benefits. (N.T. 10/20/05 at 71, 85-87.) He also discussed medical benefits with his co-workers who were also former military personnel. (N.T. 10/20/05 at 76-77.)

296. Mr. Horshaw subsequently withdrew his request for retirement, however, because he had heard there would be a voluntary layoff program pursuant to which participants would receive a severance payment. (N.T. 10/20/05 at 75-76.)

297. On several occasions, human resources representatives reminded Mr. Horshaw that he would

be provided free lifetime medical benefits. (N.T. 10/20/05 at 71.) Just prior to his last day of work, Ms. Blount told Mr. Horshaw, "just think, you are getting free medical benefits." (N.T. 10/20/05 at 71-72.)

298. Mr. Horshaw depended on the promise of free lifetime medical benefits in making his decision to retire from Burroughs. (N.T. 10/20/05 at 72.)

299. If he had known that the Company could change or terminate the retiree medical benefits such that they would not be provided at no cost for lifetime, Mr. Horshaw would have sought employment with another company. (N.T. 10/20/05 at 72.)

300. On June 27, 1988, Mr. Horshaw executed a Post-Retirement Medical Plan Enrollment/Change Form in order to receive retiree medical benefits under the Burroughs Plan. (Ex. P-259.)

301. Mr. Horshaw participated in a Company savings plan while he was an employee. (N.T. 10/20/05 at 72.)

302. After his medical insurance costs are subtracted from his pension distribution, Mr. Horshaw receives $13 per month. (N.T. 10/20/05 at 73.)

(12) **Theodore Botzum**

303. Theodore Botzum was born June 3, 1932 and is divorced. (N.T. 10/20/05 at 89-90; Ex. P-336.)

304. Mr. Botzum was employed by Burroughs from December 10, 1956 until his retirement on

March 31, 1989 at age fifty-six pursuant to a voluntary work force reduction. (N.T. 10/20/05 at 90; Exs. P-201, P-336.)

305. Mr. Botzum first heard about the retirement offer through written materials that the Company circulated. (N.T. 10/20/05 at 97.) Mr. Botzum's understanding was that the medical plan would cost him $20 per month until he reached sixty-five at which time the plan would be free for life. (N.T. 10/20/05 at 97.) This offer of medical coverage "drove" his decision to retire and participation in the Burroughs Plan was "instrumental" to Mr. Botzum's decision to retire. (N.T. 10/20/05 at 97, 103.) Mr. Botzum thought that because he would have full medical coverage, he would be able to change careers and volunteer with children. (N.T. 10/20/05 at 96.)

306. Mr. Botzum spoke with his co-workers regarding the retirement offer. (N.T. 10/20/05 at 97-98.)

307. On two occasions, Mr. Botzum met with human resources representatives to discuss the retirement package. (N.T. 10/20/05 at 98.) The medical benefits package was presented to him as described in the materials that the Company had posted. (N.T. 10/20/05 at 98.) Mr. Botzum was told by a human resources staff member that retiree medical benefits would cost $20 per month until the retiree reached age sixty-five at which time they would be provided at no cost for the remainder of the retiree's life. (N.T. 10/20/05 at 98-99.)

308. Mr. Botzum received a letter dated March 8, 1989 from the Company which included documentation needed to process his retirement and an explanation of his benefits as a volunteer for the work force reduction. (N.T. 10/20/05 at 101; Ex. P-201.)

309. On March 13, 1989, Mr. Botzum executed a Post-Retirement Medical Plan Enrollment/Change Form and thereby authorized the Company to withhold from his pension the necessary contributions for participation in the Burroughs Plan. (N.T. 10/20/05 at 102; Ex. P-202.)

310. On March 13, 1999, Mr. Botzum also executed a COBRA form. (N.T. 10/20/05 at 119-20; Ex. D-108.)

311. Mr. Botzum may have received the Benefits Portfolio and personalized annual benefits statements during the course of his employment, but does not recall specifically receiving them. (N.T. 10/20/05 at 126-27, 132.) Mr. Botzum does not recall reading the ROR language in the annual benefits statements. (N.T. 10/20/05 at 127-28.)

312. Had he not been told by the Company that he would receive free medical benefits after age sixty-five, he would not have retired at that time. (N.T. 10/20/05 at 132.)

313. Mr. Botzum was aware of a number of changes that the Company made to his medical benefits while he was an active employee, such as increasing the deductible and initiating the Call First

program, but he was not aware that the changes also applied to retiree medical benefits. (N.T. 10/20/05 at 117-18, 136.) He thought the retiree medical plan "was a separate entity." (N.T. 10/20/05 at 136.)

314. No one from the Company ever told Mr. Botzum that the Company could not modify or eliminate retiree medical benefits. (N.T. 10/20/05 at 118-19.) No one from the Company told Mr. Botzum that the Company could change the medical benefits or cancel the plan completely. (N.T. 10/20/05 at 137.)

315. If retiree medical benefits under the Burroughs Plan had not been a part of the retirement offer, Mr. Botzum "would not even have considered leaving at age fifty-six." (N.T. 10/20/05 at 103.) He would have continued working until age sixty-two or sixty-five. (N.T. 10/20/05 at 103.)

316. While an employee, Mr. Botzum participated in an employee stock purchase program, but he would not have continued to participate in that plan had he worked past the time he retired because the Company's stock price had fallen and he chose to withdraw his funds and re-invest them elsewhere. (N.T. 10/20/05 at 111-12.)

317. Mr. Botzum considered the severance offer of one week's salary for every year worked at the Company that was a component of the voluntary work force reduction pursuant to which he retired as "icing on the cake." (N.T. 10/20/05 at 98.) At retirement, Mr. Botzum received a lump sum of thirty-two weeks of salary. (N.T. 10/20/05 at 113.)

318. When he learned that the Company would increase the cost of participating in the Burroughs Plan, Mr. Botzum left the Burroughs Plan because the costs were "prohibitive." (N.T. 10/20/05 at 105.) He had been volunteering on a part-time basis at the Deveraux Foundation, but began working full-time so that he could receive medical benefits. (N.T. 10/20/05 at 107-08.) Mr. Botzum worked for the Deveraux Foundation for approximately nine or ten years, beginning in 1993. (N.T. 10/20/05 at 108.)

319. After leaving the Deveraux Foundation, Mr. Botzum obtained medical insurance through the Veterans' Administration for one year and later obtained insurance through Pacificare. (N.T. 10/20/05 at 108-09.)

320. Mr. Botzum has paid premiums for medical insurance other than to Unisys. (N.T. 10/20/05 at 109; Ex. P-203.)

(13) Eugene Paul Endress

321. Eugene Paul Endress was born April 13, 1932 and is married. (N.T. 10/21/05 at 4-5.)

322. Mr. Endress was employed by Burroughs from November 1966 until he ceased working on November 30, 1988 as part of a voluntary layoff program. (N.T. 10/21/05 at 9, 25.)

323. Mr. Endress first worked in the receiving inspection department and then in the quality assurance engineering department in the Company's

Downingtown facility. (N.T. 10/21/05 at 10-12.) During the course of his employment with the Company, Mr. Endress was promoted to various positions. (N.T. 10/21/05 at 12-15.) From September 1985 through October 1986, Mr. Endress was assigned to work in Europe as part of a government contract project. (N.T. 10/21/05 at 15-16.)

324. During the mid-1980's there were periods between contracts when the Company would layoff employees and at times would rehire such employees when another contract became available. (N.T. 10/21/05 at 16.) Mr. Endress at times had to lay off employees that he supervised, but was able to rehire many of them after another contract became available. (N.T. 10/21/05 at 16.)

325. By letter dated July 15, 1988, Mr. Endress requested participation in a voluntary layoff program effective November 30, 1988. (N.T. 10/21/05 at 20; Ex. D-137.) Mr. Endress requested participation in the layoff program because the contract on which he was working had ended and there was uncertainty whether there would be another contract. (N.T. 10/21/05 at 20.) Mr. Endress did not speak with a human resources representative at the time he volunteered for the layoff in July 1988. According to Mr. Endress, the layoff was not considered "quitting" and he believed that if another contract became available, he would be recalled because of his positive past performance. (N.T. 10/21/05 at 22, 26.) Some of the employees who he supervised previously had taken the layoff and were recalled when a new

contract began. (N.T. 10/21/05 at 26.) However, no one at the Company ever told Mr. Endress that he would be recalled from the layoff. (N.T. 10/21/05 at 51.) The Company had the right to turn down Mr. Endress' request for layoff and it did not do so. (N.T. 10/21/05 at 52.)

326. The voluntary layoff package included severance pay of one week for every year worked at the Company and pay for accrued but unused vacation. (N.T. 10/21/05 at 22-23.) Mr. Endress received a severance payment of twenty-two weeks of salary. (N.T. 10/21/05 at 23.)

327. During the severance period, Mr. Endress continued to receive medical benefits as an active employee under the Burroughs Plan. (N.T. 10/21/05 at 26-27.) Mr. Endress did not have a discussion with anyone at Burroughs about medical benefits before he decided to participate in the voluntary layoff program because he "assumed that collecting severance pay that it was going to stay in effect during that period of time." (N.T. 10/21/05 at 23.)

328. In February 1989, Mr. Endress received by mail a memorandum from Mr. Blaine setting forth the documents that were required for retirement. (N.T. 10/21/05 at 27-28; Ex. P-217.) Attachment A to the memorandum represented that retiree medical benefits under the Burroughs Plan would cost $20 per month until age sixty-five and then would have no cost thereafter for life. (N.T. 10/21/05 at 30; Ex. P-217 at Attachment A.)

329. Mr. Endress also received a memorandum under Mr. Blaine's signature which contained comparisons of the medical plans that were available for retirees and which notified the recipient that retiree medical benefits under the Burroughs Plan was available only to those individuals who retired on or before April 1, 1989. (N.T. 10/21/05 at 29; Ex. P-218.) Based on this information, Mr. Endress concluded that he would rather receive retiree medical benefits under the Burroughs Plan than the Unisys PRM Plan. (N.T. 10/21/05 at 31.)

330. In response to the documents he received by mail, Mr. Endress met with a human resources staff member in March 1989 to complete the paperwork necessary to process his retirement. (N.T. 10/21/05 at 31-32.) Mr. Endress met primarily with Sandra Wolonik to process his retirement paperwork. (N.T. 10/21/05 at 32-33.) He had dealt with Ms. Wolonik on numerous prior occasions during his employment with regard to staffing issues. (N.T. 10/21/05 at 33.)

331. In his meeting with Ms. Wolonik, they discussed the retirement documents he had received, including those related to the costs of the Burroughs Plan. (N.T. 10/21/05 at 33-34; Ex. P-218.) Ms. Wolonik confirmed the Company's policy that the costs of the medical plan for retirees would be $20 per month until age sixty-five at which time there would be no cost to the retiree. (N.T. 10/21/05 at 35.)

332. Mr. Endress understood from the memoranda that he received from the Company that the cost structure of the retiree medical benefits would "be that way forever." (N.T. 10/21/05 at 36.)

333. Mr. Endress' retirement date is April 1, 1989. (N.T. 10/21/05 at 39.)

334. If Ms. Wolonik had told Mr. Endress that the Company had the right to increase the costs of the medical plan after retirement or had the right to terminate the plan, he would have returned to the Company if another contract became available and would have worked until age sixty-five or seventy instead of retiring at age fifty-six. (N.T. 10/21/05 at 38-39.)

335. While an active employee with Burroughs, Mr. Endress received medical benefits at no cost to him, a pension accrual, and he participated in the Company's voluntary savings plan. (N.T. 10/21/05 at 18-19.)

336. Mr. Endress received documents from the Company regarding medical benefits, but does not recall specifically whether he received any personalized annual benefits statements. (N.T. 10/21/05 at 60-62, 69, 78-79.)

337. While he was an active employee with Burroughs, Mr. Endress was aware that the Company had instituted certain changes to the medical plan, such as changes to deductibles and co-pays and

the implementation of the Call First program. (N.T. 10/21/05 at 19-20.)

338. Mr. Endress executed a Post-Retirement Medical Plan Enrollment/Change Form on March 6, 1989. (Ex. D-147.)

339. After retiring from the Company, Mr. Endress purchased a beer distributor business in August 1989 which he operated for five or six years before selling in 1996. (N.T. 10/21/05 at 39.) The purchaser of the business ultimately defaulted on the purchase. (N.T. 10/21/05 at 40.) If he had known at the time of his retirement that the Company retained the right to change, modify or terminate the Burroughs Plan for any reason, Mr. Endress would not have purchased the beer distribution business. (N.T. 10/21/05 at 44.) Instead, he would have sought employment elsewhere which would have provided medical benefits. (N.T. 10/21/05 at 44.)

340. After the sale of his business, Mr. Endress worked part-time for a manufacturer of micro-coax cable. (N.T. 10/21/05 at 41.) For the past eight years, he has worked as a school bus driver, five days per week for a total of approximately thirty hours. (N.T. 10/21/05 at 41.) He does not receive benefits in this position. (N.T. 10/21/05 at 41.)

341. After the Company notified participants of the Burroughs Plan that they would be transferred into the Unisys Plan and would begin contributing for premiums in 1992, Mr. Endress stayed in the plan for two years with the costs being deducted from his

pension payment. (N.T. 10/21/05 at 42.) He subsequently left the Unisys Plan in 1995. (N.T. 10/21/05 at 42.)

342. Since 1995, Mr. Endress has paid premiums for participation in health insurance plans other than the Unisys Plan. (N.T. 10/21/05 at 43.)

343. In addition to the cost of health insurance premiums, Mr. Endress has incurred out-of-pocket expenses for the medical care of he and his wife since 1995, such as co-payments, the cost of prescription medication, and hospital and doctor expenses. (N.T. 10/21/05 at 45-46; Ex. P-227.) He has not been reimbursed by any health insurance carrier for these expenses. (N.T. 10/21/05 at 46.)

(14) Robert Schieman

344. Robert J. Schieman was born May 8, 1933 and is married. (N.T. 10/21/05 at 81.)

345. After completing a three-year program in electronic and industrial engineering technology, Mr. Schieman worked at Burroughs from September 1959 until 1971. (N.T. 10/21/05 at 82, 84, 86.) He then left Burroughs to work at an avionics company. (N.T. 10/21/05 at 86.)

346. Mr. Schieman was rehired by Burroughs and worked there from November 5, 1973 until his retirement on March 31, 1989 at age fifty-five. (N.T. 10/21/05 at 84-86; Ex. P-346.)

347. Mr. Schieman's title at the time of his retirement was manager of publications production. (N.T. 10/21/05 at 88.) In this position, Mr. Schieman had approximately ten employees reporting to him. (N.T. 10/21/05 at 89.)

348. With regard to his retirement, Mr. Schieman and his wife initially had planned that he would retire at age sixty-two, when he would be eligible to collect Social Security benefits. (N.T. 10/21/05 at 89.)

349. Mr. Schieman received a memorandum entitled Group Medical Benefits for Retired Employees dated June 22, 1984 and an accompanying enrollment card. (N.T. 10/21/05 at 92; Exs. P-269, P-270.) Mr. Schieman retained these documents in his files because they pertained to retirement benefits and he had a practice of retaining documents relating to medical benefits and benefits in general. (N.T. 10/21/05 at 92.) From these documents, Mr. Schieman understood that his medical benefits upon retirement would cost $20 per month until age sixty-five at which time there would be no cost for the benefits. (N.T. 10/21/05 at 94.)

350. In February 1989, Mr. Schieman received a copy of the memorandum from Mr. Blaine, by which the Company announced the implementation of the Unisys PRM Plan. (N.T. 10/21/05 at 90; Ex. D-261.) The memorandum was addressed to all employees who were eligible to retire at that time. (N.T. 10/21/05 at 90; Ex. D-261.) Based upon his reading of this document, Mr. Schieman understood that the cost of

retiree medical benefits under the Burroughs Plan would be $20 per month until age sixty-five after which time there would be no cost for participation. (N.T. 10/21/05 at 90-91.)

351. On March 22, 1989, Mr. Schieman's department was called into a general meeting and he was informed that there would be a workforce reduction effective May 21, 1989 which would eliminate the department. (N.T. 10/21/05 at 94.) Prior to this date, Mr. Schieman had no plans to retire before age sixty-two. (N.T. 10/21/05 at 94-95.)

352. Betty Burdette, a human resources staff member, attended the meeting on March 22, 1989. (N.T. 10/21/05 at 95.) After the general meeting, Ms. Burdette met individually with each member of the department. (N.T. 10/21/05 at 95.)

353. In his meeting with Ms. Burdette, Ms. Burdette informed Mr. Schieman that he qualified to take early retirement in lieu of the workforce reduction. (N.T. 10/21/05 at 96.) Ms. Burdette informed Mr. Schieman that if he retired, Mr. Schieman would receive a severance payment equal to a week's pay for every year worked, a payment for accrued but unused vacation, and he would be eligible to begin receiving his pension. (N.T. 10/21/05 at 96.) Ms. Burdette explained to Mr. Schieman that he would be eligible to receive retiree medical benefits under the Burroughs Plan which would cost $20 per month until age sixty-five, after which time there would be no cost for participation in the plan. (N.T. 10/21/05 at

97.) They also discussed the general benefits of the Burroughs Plan, such as deductibles, out-of-pocket expenses, and premiums. (N.T. 10/21/05 at 97-98.) Ms. Burdette also instructed Mr. Schieman that he would need to sign up for the Burroughs Plan by April 1, 1989 if he wanted to receive retiree medical benefits under that plan. (N.T. 10/21/05 at 98.) Ms. Burdette told Mr. Schieman that she would return on March 28 to process the department's paperwork. (N.T. 10/21/05 at 98.)

354. Mr. Schieman received by mail three letters dated March 22, 1989 and signed by Ms. Burdette. (N.T. 10/21/05 at 99-100; Exs. D-262, D-263.) Mr. Schieman understood from one of the letters that within a year of being laid off, he would have been considered or offered for recall in his present work position or category, or if he desired, he could have applied for another job classification. (N.T. 10/21/05 at 100; Ex. D-262.) At that time, Mr. Schieman was working at the Company's Blue Bell facility. (N.T. 10/21/05 at 101.) Mr. Schieman thought that he "had a very good chance of being recalled" on the basis that the Company had a lot of work and was redistributing the workload amongst the east, central and western divisions. (N.T. 10/21/05 at 101.)

355. Mr. Schieman wrote a letter dated March 24, 1989 to Ms. Burdette pursuant to which he requested retirement with medical benefits to be provided under the Burroughs Plan. (N.T. 10/21/05 at 103; Ex. P-268.) Mr. Schieman wanted to retire, as opposed to being laid off, because if he retired he was

eligible to receive medical benefits under the Burroughs Plan. (N.T. 10/21/05 at 103.) Had he been laid off, Mr. Schieman would have received benefits under the Unisys PRM Plan, which he felt was an inferior plan that did not have "locked-in" low premiums. (N.T. 10/21/05 at 103.) Participation in the Burroughs Plan was a "key point" in his decision to retire. (N.T. 10/21/05 at 103.) In the letter, Mr. Schieman asked Ms. Burdette to confirm in writing that he would be enrolled in the Burroughs Post-Retirement Medical Plan described in Attachment 4 to the February 1989 notice. (N.T. 10/21/05 at 104; Ex. P-268.)

356. Ms. Burdette responded to Mr. Schieman's March 24, 1989 letter in a writing dated March 27, 1989. (N.T. 10/21/05 at 104; Ex. P-268.) In this letter, Ms. Burdette accepted Mr. Schieman's request for retirement and confirmed that he would receive retiree medical benefits under the Burroughs Plan and that he would receive as severance a week's worth of salary for every year he had worked, plus pay for accrued but unused vacation. (N.T. 10/21/05 at 104-05; Ex. P-268.)

357. On March 28, 1989 Mr. Schieman met with Ms. Burdette to complete the documents necessary to process his retirement. (N.T. 10/21/05 at 105.) Mr. Schieman did not read the retirement documents before he signed them. (N.T. 10/21/05 at 105-06.) Although his retirement date was March 31, 1989, Mr. Schieman elected to defer his pension until June of that year. (N.T. 10/21/05 at 106-07.)

358. Mr. Schieman executed a COBRA form on March 28, 1989. (Ex. D-250.)

359. Participation in the Burroughs Plan was the most important part of Mr. Schieman's retirement decision because he was able to plan his future finances on the basis of low-cost out-of-pocket payments and premiums. (N.T. 10/21/05 at 107.)

360. If he had known that the Company had the right to cancel or change the costs of the Burroughs Plan, Mr. Schieman would not have taken early retirement. (N.T. 10/21/05 at 107-08.) In addition, had he known earlier that the Company had the right to cancel or change the costs of the Burroughs Plan, he would not have made certain large, risky investments that he did, because at that time he considered his medical costs and premiums to be negligible in terms of factoring them into his financial plan. (N.T. 10/21/05 at 109.)

361. Mr. Schieman retired at age fifty-five and was in good health. (N.T. 10/21/05 at 109.) There was no reason from a health perspective that he could not continue to work. (N.T. 10/21/05 at 109.)

362. If he had not retired on March 31, 1989, Mr. Schieman would have used the time prior to the May 21, 1989 layoff to pursue other employment opportunities within the Company. (N.T. 10/21/05 at 116-17.) If there had been no opportunities within the Company, Mr. Schieman would have sought employment elsewhere. (N.T. 10/21/05 at 117.)

363. Mr. Schieman received a copy of the retiree SPD for the Burroughs Plan on or about June 5, 1989. (N.T. 10/21/05 at 115-16, 126-27, 142-43; Ex. P-350.)

364. In 1995, Mr. Schieman left the Burroughs Plan because the costs were becoming prohibitive. (N.T. 10/21/05 at 110.) At that time, Mr. Schieman enrolled he and his wife in QualMed, an HMO. (N.T. 10/21/05 at 110.) When he became eligible for Medicare at age sixty-five, Mr. Schieman again changed health plans and enrolled in Keystone 65. (N.T. 10/21/05 at 110; Exs. P-274, P-275.) Mr. Schieman enrolled his wife in the same plan when she reached age sixty-five. (N.T. 10/21/05 at 110-11.) In connection with their participation in the Keystone 65 plan, Mr. Schieman and his wife have paid premiums, co-pays, and prescription expenses. (N.T. 10/21/05 at 111-12; Ex. P-276.)

365. While he was employed by Burroughs, Mr. Schieman participated in the Company's savings plan and he would have continued to contribute to this plan had he not retired when he did. (N.T. 10/21/05 at 112-13.)

366. Mr. Schieman requested a printout of his service and pension records from the Company. (N.T. 10/21/05 at 112-14; Ex. P-351.)

367. Mr. Schieman did not seek employment after the Company increased the cost of medical benefits to retirees in 1993. (N.T. 10/21/05 at 136.)

368. If he had not retired when he did, Mr. Schieman would have delayed taking his pension. (N.T. 10/21/05 at 117.) Because he retired at age fifty-six, instead of age sixty-two, there was an actuarial reduction in the amount of his pension benefit. (N.T. 10/21/05 at 137.)

369. While an active employee of Burroughs, Mr. Schieman received personalized annual benefits statements. (N.T. 10/21/05 at 130.) Mr. Schieman read the financial status section of the documents, but did not read the portion of the documents that related to retiree medical benefits. (N.T. 10/21/05 at 130-32.) Mr. Schieman also received the Benefits Portfolio. (N.T. 10/21/05 at 132.)

370. While an active employee of Burroughs, Mr. Schieman was aware that the Company had made changes to the medical plan, but considered these changes to be "minor changes" and changes "for the better." (N.T. 10/21/05 at 132-33.) Mr. Schieman remembers that the Company instituted a pre-certification program known as Call First. (N.T. 10/21/05 at 133.)

371. At the time of his retirement, Mr. Schieman received twenty-six weeks of severance pay. (N.T. 10/21/05 at 133.)

372. In 1987, Mr. Schieman received $220,000 after taxes were paid as part of an inheritance. (N.T. 10/21/05 at 133-34.)

Having made the above Findings of Fact, the court makes the following:

III. CONCLUSIONS OF LAW

A. Background

1. This court has subject matter jurisdiction of this action arising under ERISA pursuant to 29 U.S.C. § 1132(f) and 28 U.S.C. § 1331.

2. ERISA "was enacted, in part, to ensure that employees receive sufficient information about their rights under employee benefit plans to make well-informed employment and retirement decisions." *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 451 (3d Cir. 2000) (citing *Jordan v. Fed. Express Corp.*, 116 F.3d 1005, 1012 (3d Cir. 1997)). As such, ERISA imposes certain obligations upon fiduciaries. *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996); *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 384 (3d Cir. 2003).

3. The Trial Plaintiffs presently seek declaratory, injunctive and other equitable relief under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) for alleged violations of ERISA Section 404 which defines fiduciary duties owed by plan administrators to their beneficiaries. Under section 404(a)(1)(A) of ERISA, a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A).

4. The Trial Plaintiffs claim that Unisys breached its fiduciary duty under section 404(a) of ERISA "on a continuing basis by misrepresenting the true nature of their retiree medical benefits and concealing the fact that the company actually purported to reserve the right to amend or terminate their benefits at any time for any reason." Am. Complaint at Count I. (Doc. No. 3.) Specifically, the Trial Plaintiffs assert two distinct breach of fiduciary duty claims against Unisys under section 404(a) of ERISA. First, they claim that the Company affirmatively misrepresented to them that they would have free or low-cost medical benefits throughout retirement or for life. Second, they claim that the Company breached its fiduciary duty by failing to adequately disclose material information regarding retiree medical benefits. *See Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 76 (3d Cir. 2001) (distinguishing claims for breach of fiduciary duty based on affirmative misrepresentation and inadequate disclosure). Each of the Trial Plaintiffs have raised colorable claims of a breach of fiduciary duty and detrimental reliance. Therefore, they each have standing to bring their claims for relief. *See Leuthner v. Blue Cross and Blue Shield of Ne. Pennsylvania*, 454 F.3d 120, 127-29 (3d Cir. 2006) ("[W]e may find that a plaintiff has statutory standing if the plaintiff can in good faith plead that she was an ERISA plan

participant or beneficiary and that she still would be but for the alleged malfeasance of a plan fiduciary.").

B. Breach of Fiduciary Duty

5. As noted *supra,* the Trial Plaintiffs assert two types of breach of fiduciary duty claims. To prove a breach of fiduciary duty for affirmative misrepresentation under ERISA, a plaintiff must establish (1) the defendant's status as an ERISA fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation. *Burstein,* 334 F.3d at 384; *Daniels,* 263 F.3d at 73. To prove a breach of fiduciary duty for inadequate disclosure under ERISA, a plaintiff must show that (1) the defendant was acting in a fiduciary capacity; (2) the defendant failed to adequately inform plan participants and beneficiaries; (3) the defendant knew of the confusion generated by its silence; and (4) detrimental reliance by the plaintiff. *Burstein,* 334 F.3d at 384; *UAW v. Skinner Engine Co.,* 188 F.3d 130, 148 (3d Cir. 1999). The court will address the Trial Plaintiffs claims under each framework.

(1) Fiduciary Status

6. To prove each type of breach of fiduciary duty claim, a plaintiff must establish that the alleged

communication was made by an authorized fiduciary.[3] *See Daniels*, 263 F.3d at 72. In the present case, the Trial Plaintiffs contend that when the various human resources staff members and/or supervisors communicated with the Trial Plaintiffs about retiree medical benefits, they were functioning as ERISA fiduciaries. Defendant contends, however, that several of the Trial Plaintiffs are unable to prove fiduciary misconduct because they did not identify any individual who allegedly made a misrepresentation to them and that several of the Trial Plaintiffs are unable to prove fiduciary misconduct because the communications at issue were made by supervisors or co-workers who did not have actual or apparent authority to speak on behalf of the Company on benefits-related matters. The court must determine whether such individuals were acting on the Company's behalf, and within the scope of their authority as agents of the Company, when communicating with the Trial Plaintiffs. *See Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 987-89 (3d Cir. 1995).

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[3] Under ERISA, a fiduciary is any person who "exercises any discretionary authority or discretionary control respecting management of such plan . . . or has any discretionary authority in the responsibility in the administration of the plan." 29 U.S.C. § 1002(21)(A). Burroughs and, later, the Company, acted as plan administrator in making the communications to the Trial Plaintiffs that are the basis of their claims of breach of fiduciary duty. "[W]hen a plan administrator explains plan benefits to its employees, it acts in a fiduciary capacity." *In re Unisys Corp. Retiree Med. Benefit Litig.*, 57 F.3d 1255, 1261 n. 10 (3d Cir. 1995).

7. For an individual to qualify as an ERISA fiduciary, he must have actual or apparent authority to advise the company's employees of their rights under the plan at issue. *In re Unisys Corp. Retiree Med. Benefit Litig.*, 2003 WL 252106, at *4 (E.D. Pa. Feb. 4, 2003) (citing *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 988-89 (3d Cir. 1995)). Apparent authority "(1) 'results from a manifestation by a person that another is his agent' and (2) 'exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized.'" *Taylor*, 49 F.3d at 989 (quoting *Restatement (Second) of Agency* § 8 cmts. a & c (1958)). Furthermore, "apparent authority arises in those situations where the principal causes persons with whom the agent deals to reasonably believe that the agent has authority." *Id.* (internal quotations and citations omitted).

8. The court finds that each of the Trial Plaintiffs have established that the Company's agents communicated with the Trial Plaintiffs about retiree medical benefits and that such Company employees had apparent, if not actual, authority to make such communications. In addition to the documentation that the Company distributed regarding retiree benefits, each Trial Plaintiff credibly testified that he or she was advised by either a member of the human resources staff or a supervisor about the cost and duration of retiree medical benefits. It is apparent from the trial testimony that the Company delegated to the human resources staff and other managers the

function of advising employees about benefits. *See, e.g.*, Findings of Fact Nos. 80, 82-85. Each of the communications at issue were made by Company representatives in the context of assisting the Trial Plaintiffs with gathering information about retiree benefits, including retiree medical benefits. In addition, each of the communications at issue were made at the time each of the Trial Plaintiffs was specifically contemplating retirement and analyzing whether he or she was financially able to retire. It was, therefore, reasonable for the Trial Plaintiffs to believe that such human resources staff and supervisors were authorized to speak on behalf of the Company regarding retiree medical benefits.

9. The court finds that Trial Plaintiffs DiLoreto, Endress, Gallagher, Geneva, Schieman, and Yeager, have established that the specific human resources staff members who communicated information about retiree medical benefits to them had the apparent authority as the agents of an ERISA fiduciary to do so. The human resources staff members identified by Trial Plaintiffs DiLoreto, Endress, Gallagher, Geneva, Schieman, and Yeager were acting on the Company's behalf, and within the scope of their authority as agents of the Company, when communicating with the Trial Plaintiffs about the cost and duration of retiree medical benefits. *See, e.g.*, Findings of Fact Nos. 94, 117, 196, 252, 331, 353.

10. In addition, although Trial Plaintiffs Walnut, Peterman, Castorani, Stringer, and Botzum were unable to identify a specific Company representative

who communicated information about retiree medical benefits to them, the court finds credible their testimony that each had spoken with a member of the human resources department regarding retiree medical benefits and that such meetings formed the basis of their understanding as to the cost and duration of the benefits. Trial Plaintiffs Walnut, Peterman, Castorani, Stringer and Botzum testified with specificity about the circumstances of their meetings with the respective human resources representatives. Each Trial Plaintiff met with a member of the human resources staff either individually, or as a participant in a Company-led group meeting. It was thus reasonable for these Trial Plaintiffs to believe that such members of the human resources staff were acting on the Company's behalf, and within the scope of their authority as agents of the Company, when advising these Trial Plaintiffs about the cost and duration of retiree medical benefits. *See, e.g.,* Findings of Fact Nos. 139, 155, 169-70, 214, 307.

11. Contrary to defendant's contention that Trial Plaintiff Horshaw's claim should fail because the alleged misrepresentation was made by a co-worker, the court finds that Mr. Horshaw has established that a member of the human resources staff, Marie Blount, communicated to Mr. Horshaw about retiree medical benefits and was functioning as

the agent of an ERISA fiduciary in doing so.[4] Ms. Blount was the member of the human resources staff that he met with to process his retirement paperwork. It was, therefore, reasonable for Mr. Horshaw to believe that Ms. Blount was acting on the Company's behalf, and within the scope of her authority as an agent of the Company, when advising Mr. Horshaw about the cost and duration of retiree medical benefits.

12. In addition, defendant contends that the affirmative misrepresentation claims of Trial Plaintiffs Hansell and Ginsberg fail because they are unable to prove fiduciary misconduct because the retiree benefits communications at issue were made by supervisors who did not have actual or apparent authority to speak on behalf of the Company on benefits-related matters. *See* Def.'s Proposed Conclusions of Law Nos. 28-30, 33. The court finds that the supervisors with whom Trial Plaintiffs Hansell and Ginsberg spoke had apparent authority to advise them regarding retiree medical benefits and that such supervisors were functioning as the Company's

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[4] Defendant also contends that the affirmative misrepresentation claims of Trial Plaintiffs DiLoreto and Walnut should fail because the alleged misrepresentations were made by co-workers. *See* Def.'s Proposed Conclusions of Law Nos. 30-32. The court has already concluded that Trial Plaintiffs DiLoreto and Walnut have established the fiduciary status element of their breach of fiduciary duty claims. *See supra* Conclusions of Law Nos. 9 and 10 regarding Trial Plaintiffs DiLoreto and Walnut.

agents in doing so. In 1986 and 1988, Mr. Hansell attended Company sponsored meetings for potential retirees and he spoke with his supervisor, Mr. Depietropaolo, on several occasions regarding retiree medical benefits. Sometime in late 1988 or early 1989, Mr. Hansell also met with Angelo Bellis, the head of human resources at the Company's Devon facility, to obtain information about his retirement benefits. Mr. Ginsberg's supervisor, Gerry Whalen, held a meeting for his staff regarding a voluntary layoff program during which the cost and duration of retiree medical benefits were discussed. Furthermore, a member of the human resources staff, Eloise Phillips, confirmed the content of the communication regarding retiree benefits made by Mr. Ginsberg's supervisor. Thus, it was reasonable for each of Mr. Hansell and Mr. Ginsberg to believe that their supervisors were acting on the Company's behalf, and within the scope of their authority as agents of the Company, when advising these Trial Plaintiffs about the cost and duration of retiree medical benefits.

(2) Affirmative Misrepresentation

13. To prove a breach of fiduciary duty for affirmative misrepresentation under ERISA, each Trial Plaintiff must establish that a fiduciary made a material misrepresentation to him or her. *See Daniels*, 263 F.3d at 73 (delineating the elements of an ERISA breach of fiduciary duty claim based on an affirmative misrepresentation). A misrepresentation is material "if there is a substantial likelihood that it

would mislead a reasonable employee in making a decision regarding his benefits under the ERISA plan. *Id. See also In re Unisys Corp. Retiree Med. Benefit Litig. ("Unisys II")*, 57 F.3d 1255, 1264 (3d Cir. 1995) (citing *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993)) (same).

14. The Trial Plaintiffs contend that the Company made material misrepresentations to each of the Trial Plaintiffs by assuring the Trial Plaintiffs that they would have secure, free or low-cost medical benefits throughout retirement or for life. The trial record establishes that the Company made material misrepresentations to each Trial Plaintiff regarding the cost and duration of retiree medical benefits under the Burroughs Plan.

15. The court finds credible the testimony of each of the Trial Plaintiffs that the Company misrepresented the cost and duration of retiree medical benefits under the Burroughs Plan by advising each of them that he or she would have free or low-cost medical benefits throughout retirement or for life. *See* Findings of Fact Nos. 96 (DiLoreto), 117 (Gallagher), 139 (Walnut), 155 (Peterman), 170 (Castorani), 194 (Geneva), 214 (Stringer), 227-28 (Hansell), 254 (Yeager), 272 (Ginsberg), 295, 297 (Horshaw), 307 (Botzum), 331 (Endress), 353 (Schieman). The Company misrepresented the cost and duration of retiree medical benefits under the Burroughs Plan despite the Company's reserved right to amend or terminate retiree medical benefits under the Burroughs Plan.

16. The court further concludes that such misrepresentations were material in that there was a substantial likelihood that each misrepresentation would mislead a reasonable employee in making a decision regarding his or her retiree medical benefits under the Burroughs Plan.

17. In analyzing whether the Company's communications to the Trial Plaintiffs regarding the cost and duration of retiree medical benefits were materially misleading, the court must determine whether the harm to the Trial Plaintiffs was reasonably foreseeable. *See In re Unisys Corp. Retiree Med. Benefit Litig. ("Unisys III")*, 242 F.3d 497, 508 (3d Cir. 2001) ("An employer, even when acting in a fiduciary capacity, is not responsible for harm that is not reasonably foreseeable."). In doing so, the court cannot simply ignore the existence of the SPD.[8] *See id.* ("Any determination of whether Unisys conveyed a message that was 'materially misleading' . . . cannot simply ignore the existence of the SPD."). Rather, the court must examine the content of the message conveyed and the context in which it was conveyed. *Id.*

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[8] The Third Circuit also has noted that "satisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed." *Unisys II*, 57 F.3d at 1264.

18. Based upon the evidence of record, the court concludes that a reasonable fiduciary would have foreseen that its conduct towards each Trial Plaintiff would result in important decision making on his or her part based on a mistaken belief that each possessed guaranteed lifetime benefits.[6] That is, each Trial Plaintiff's potential reliance in making a decision regarding retiree medical benefits based upon the Company's misrepresentations was reasonably foreseeable given the content and context of the statements made to the Trial Plaintiffs.

19. The content of the Company's misrepresentations to the Trial Plaintiffs concerned retiree benefits, including retiree medical benefits. In determining whether to retire, the Company counseled each Trial Plaintiff, either individually or as part of a group meeting, about the cost and duration of retiree medical benefits, representing that the benefits would cost a retiree $20 per month until age sixty-five, after which time there would be no cost to the retiree. As the Company recognized, the cost and duration of retiree medical benefits is a significant factor to an employee who is contemplating whether retirement is feasible at that time. *See* Findings of Fact Nos. 49, 69-70. In addition, the written materials that the Company distributed regarding retiree medical benefits reiterated the cost and duration of the benefits

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[6] The court will address whether each Trial Plaintiff has established the detrimental reliance element of the breach of fiduciary duty claims. *See infra* Conclusions of Law Nos. 37-55.

under the Burroughs Plan as represented by the various human resources representatives. *See, e.g.*, Exs. P-85, P-148, P-154, P-217, P-229, P-236, P-274, P-304, D-261.

20. The misrepresentations communicated to each Trial Plaintiff were made specifically in the context of advising each Trial Plaintiff about the cost and duration of retirement benefits, including retiree medical benefits. Moreover, throughout the time period that the various misrepresentations were conveyed to the Trial Plaintiffs, the Company sought to reduce staffing levels after the merger of Sperry and Burroughs and had implemented various incentive programs to achieve that goal. *See* Findings of Fact Nos. 47-54. Furthermore, in disseminating information about the cost and duration of retirement medical benefits, the Company advised at least some of the Trial Plaintiffs that there was a limited time frame in which to secure retiree medical benefits under the Burroughs Plan. *See* Findings of Fact Nos. 69, 71, 72, 74, 75, 123, 191, 252, 278, 353. In addition, the Company was aware that information concerning retiree medical benefits was critical to such employees. *See, e.g.*, Findings of Fact Nos. 49, 69-70.

21. Even taking into consideration the reservation of rights provisions in the SPDs, the content and context of the misrepresentations made it foreseeable that a reasonable employee in the position of the Trial Plaintiffs would rely upon the misrepresentations made by the Company regarding the cost and duration of retiree medical benefits under the

Burroughs Plan. Although each SPD contains an ROR provision, the record makes clear that there was confusion whether active employee medical benefits and retiree medical benefits were provided pursuant to the same plan or separate benefit plans. The Company was not clear on this point. *See* Findings of Fact No. 24. While some employees and some Trial Plaintiffs may have received the retiree SPD prior to retirement, it was the Company's policy that the retiree SPD was available upon request, but was distributed only after the Company had received an enrollment card pursuant to which the retiree had elected benefits under the Burroughs Plan. *See* Findings of Fact No. 29. Similarly, because of the confusion created by the Company as to whether retiree medical benefits were provided pursuant to the same plan or a separate plan, the Company cannot now, in hindsight, claim that changes that were instituted to medical benefits under the Burroughs Plan while the Trial Plaintiffs were active employees put them on notice that the Company retained the right to change or terminate retiree medical benefits under the Burroughs Plan. The trial record makes clear that the employee population did not understand that changes to the Burroughs Plan for active employees also translated to changes to retiree medical benefits. Moreover, such changes were not presented by the Company in the negative light that they now claim. Several of the Trial Plaintiffs who testified that they realized that the Company had changed benefits for active employees indicated that the changes were perceived to be insignificant.

22. The court also does not find persuasive defendant's argument that the Company did not affirmatively misrepresent retiree medical benefits to the Trial Plaintiffs because no one at the Company ever told any Trial Plaintiff anything that was not true regarding retiree medical benefits. Defendant contends that the statements to the Trial Plaintiffs regarding retiree medical benefits were true at the time they were said and accordingly cannot be misrepresentations. The court concludes, however, that this argument is misplaced. While the communications to the Trial Plaintiffs which are alleged to be misrepresentations were perhaps not facially false statements when taken out of context, they were nonetheless misleading. They were misleading because the Company knew that by failing to qualify those statements with the caveat that the Company could modify or terminate the retirees' medical benefits at any time, its employees would be misled when they made the important decision to retire. *See Restatement (Second) of Torts* § 529 (1977) ("A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.").

23. In *Peterson v. American Telephone & Telegraph Co.*, 127 Fed. Appx. 67, 72, 2005 WL 751925 (3d Cir. Apr. 4, 2005) (not precedential), the Third Circuit affirmed the district court's granting of summary judgment in favor of the employer on the

plaintiffs' breach of fiduciary duty claims and held that the retirees were not misled as to their benefits. The court found that when the employer made the statements to the retirees, the employer believed them to be true and the information was accurate at that time. *Peterson,* 127 Fed. Appx. at 73. The court stated, "[a]n 'honest statement of belief reasonably grounded in fact does not constitute a misrepresentation.'" *Id.* (citing *Taylor v. Peoples Natural Gas Co.,* 49 F.3d 982, 990 (3d Cir. 1995)). *Accord Leuthner,* 454 F.3d at 129 ("A representation is not a misrepresentation if it is an accurate reflection of the plan administrator's intent when the statement was made.")

24. However, the statements made to the Trial Plaintiffs in the case at bar are distinguishable from those of *Peterson.* Here, the Company's communications to each Trial Plaintiff regarding the cost and duration of retiree medical benefits were not honest statements of belief reasonably grounded in fact. The statements made to the Trial Plaintiffs were not facially false when taken out of context, but rather were half-truths. In other words, the information given to the Trial Plaintiffs was not entirely true; therefore, it was misleading. *See Restatement (Second) of Torts* § 529, cmt. a ("A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue."). *See*

also Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 200 n.19 (3d Cir. 1990) (defining misleading half-truths as "failures to disclose sufficient information to render statements actually made not misleading"). Thus, the holding of *Peterson* that true statements cannot be misrepresentations is not directly on point in the present case. The Company's statements to the Trial Plaintiffs were not "honest statements of belief reasonably grounded in fact."

25. This is evidenced again by the content and context of the Company's communications to each Trial Plaintiff. *See In re Unisys Corp. Retiree Med. Benefit Litig.*, 2003 WL 252106, at *5 (E.D. Pa. Feb. 4, 2003) (granting motion to decertify the class action and noting that the court must examine the circumstances surrounding each communication, *i.e.*, the timing, content, and context of the communication to determine whether a particular communication rises to the level of a material misrepresentation). Given these circumstances, a reference to the Company's right to terminate retiree medical benefits at the same time it represented the cost and duration of the benefits would have made such a statement an "honest statement grounded in fact."[7] The Company

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[7] The court is mindful of the Third Circuit's characterization of the present dispute. The Third Circuit noted in *Unisys II*, "this is not a case involving an employer's 'duty to remind.' Instead, this case is more accurately characterized as a dispute over an employer's duty, as an ERISA fiduciary, not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures." *Unisys II*, 57 F.3d at

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failed to make this full disclosure to the Trial Plaintiffs. *See Romero v. Allstate Corp.*, 404 F.3d 212, 227 (3d Cir. 2005) (reversing dismissal and remanding the matter for further proceedings and noting "[e]ven assuming the representations accurately described the terms of the written Pension Plan, if the representations were made for the purpose of intentionally misleading those considering . . . retirement, then these representations may still give rise to a breach of fiduciary duty under ERISA").

(3) Inadequate Disclosure

26. As set forth above, to prove a claim for breach of fiduciary duty for inadequate disclosure, in addition to showing that the Company was acting in a fiduciary capacity, the Trial Plaintiffs must show that the Company failed to adequately inform the Trial Plaintiffs and that the Company knew of the confusion generated by its silence.[8] *See Skinner Engine*, 188 F.3d at 148.

1264. The court does not presently suggest that the Company should have reminded each Trial Plaintiff about the existence of the ROR in the retiree SPD. Rather, the court finds that the Company misinformed the Trial Plaintiffs about retiree medical benefits by failing to accurately represent the cost and duration of such benefits.

[8] *See infra* Conclusions of Law Nos. 37-55 for a discussion of the detrimental reliance element of the breach of fiduciary duty claims.

27. The Third Circuit has held that "a fiduciary not only has a negative duty not to misrepresent material facts to plan beneficiaries, but also a corresponding affirmative duty to speak 'when the trustee knows that silence might be harmful.'" *Harte*, 214 F.3d at 452 (quoting *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)). *See also Adams v. Freedom Forge Corp.*, 204 F.3d 475, 493 (3d Cir. 2000) ("[A] fiduciary may not remain silent when he or she knows that a reasonable beneficiary could rely on the silence to his or her detriment."). Consistent with this duty, a fiduciary must "disclose to the beneficiary only those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection." *Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1182 (3d Cir. 1996).

28. "[A] duty to advise affirmatively of the reservation of rights clause might have arisen even in the absence of beneficiary-specific information concerning confusion or mistake" if the evidence of record is so pervasive that a reasonable fiduciary would have done more than simply rely on the SPD. *Unisys III*, 242 F.3d at 509. However, the law does not "require clairvoyance on the part of the fiduciary," but rather "requires only that a fiduciary deal fairly with his beneficiaries and, in doing so, that it 'exercise such care and skill as a man of ordinary prudence would exercise' in his own affairs." *Id.* (quoting *Restatement (Second) of Trusts* § 174). *See also*

Burstein, 334 F.3d at 386 n.31 ("The requirement that a misrepresentation must 'confuse a reasonable beneficiary' suggests that a fiduciary, as an objective matter, knew or should have known that a beneficiary would be confused.").

29. Thus, the court must decide whether a reasonable fiduciary in Unisys' position would have foreseen that its conduct towards the Trial Plaintiffs would result in important decision making on their part based on a mistaken belief that they possessed guaranteed lifetime benefits. *See Unisys III,* 242 F.3d at 509. Again, the existence of the SPD is one of the circumstances that must be considered. *Id.* The Third Circuit characterizes this as a "fair dealing" standard and one that requires "reasonable foreseeability as a prerequisite to legal responsibility on the breach of fiduciary duty claims." *Id.* at 509-10.

30. In the present case, the court finds that the Company failed to adequately inform each of the Trial Plaintiffs about the cost and duration of retiree medical benefits under the Burroughs Plan and that the Company knew of the confusion generated by its silence.

31. To the extent the Company relied on the existence of the ROR in the active employee SPD to satisfy its fiduciary obligations, the Company failed to present this information in a sufficiently clear manner. While it may be that medical benefits for active employees and retirees under the Burroughs Plan were provided pursuant to the same plan with

the same plan number, it is apparent that the Company frequently referred to retiree medical benefits as though they were provided under a separate plan. *See* Findings of Fact No. 24. Although several of the Trial Plaintiffs admitted that they knew that the medical or other benefits could change or had been changed at one time, it was therefore not unreasonable for the Trial Plaintiffs, particularly at the time they were active employees, to believe that changes to the benefits of active employees did not necessarily translate to changes to retiree benefits or that documentation distributed by the Company regarding active employee medical benefits did not pertain to retiree benefits. Moreover, the Trial Plaintiffs who acknowledged knowing that the Company previously had changed medical benefits, testified that they thought the changes were insignificant, had been portrayed by the Company in a positive light, or that there was a separate plan for the retirees such that changes to active benefits were not relevant, or directly applicable, to retiree benefits.

32. With respect to the ROR provision in the retiree SPD, only Trial Plaintiffs Walnut, Hansell, Ginsberg, Geneva and Schieman testified that they had received the retiree SPD and only Trial Plaintiffs Ginsberg and Geneva received it prior to retirement. This testimony is consistent with the Company's policy that the retiree SPD was made available to those who requested it, but it was only distributed to retirees after they had submitted an enrollment card to receive retiree medical benefits under the

Burroughs Plan. *See* Findings of Fact No. 29. In any event, even if each of the Trial Plaintiffs had received the retiree SPD prior to retirement, given the conversations that each Trial Plaintiff had with the Company representatives regarding retiree medical benefits under the Burroughs Plan, a reasonable fiduciary in the Company's position would have foreseen that its conduct towards the Trial Plaintiffs would result in important decision making on their part based on a mistaken belief that they possessed guaranteed lifetime medical benefits.

33. Furthermore, the evidence of record indicates that the confusion about the cost and duration of retiree medical benefits was pervasive. The Company was well aware that medical benefits were important to those contemplating retirement. In its internal memoranda, human resources management indicated acknowledged [sic] the significance. By confidential memorandum dated February 8, 1989, Mr. Losey noted that the Company "recognize[d] that post-retirement medical coverage is an important and valued benefit to employees." (Ex. P-155 at 74318.) *See also* Findings of Fact Nos. 72, 87. However, despite the actions it took to explain the benefits it provided, the Company was aware that its employees were confused about benefits. *See* Findings of Fact Nos. 80, 88, 90. In drafting the December 20, 1988 memorandum from Mr. Blaine to Mr. Blumenthal, Mr. Penhale acknowledged that: "Many retirees will undoubtedly suggest that when they retired they felt their medical program would continue without

change." (Ex. P-143 at 074169.) Although he based this statement on his experience in the Sperry organization, he acknowledged that it was possible that some of the Burroughs retirees also would contend that their medical benefits would not change during retirement. (N.T. 10/25/05 at 194, 233.) In preparing the human resources staff for the ultimate implementation of the Unisys Plan in 1992, the question and answer memorandum that the Company drafted shows that the Company believed that it was reasonably foreseeable that employees had relied on the promise of lifetime benefits in making their retirement decisions. *See* Ex. P-175 at 057439-057440 (stating "I thought my medical coverage and contributions would stay in effect for life," and "How can the Company make such drastic changes to medical coverage? When I retired ___ years ago, the information the Company gave me didn't indicate that the Company could make a change like this."). Thus, the court finds that the Company should have foreseen that its communications to the Trial Plaintiffs about the cost and duration of retiree medical benefits would cause reasonable employees to rely to their detriment.

34. The court also is not persuaded by defendant's argument that the presence of ROR provisions in other benefits documentation, *e.g.*, COBRA documentation, enrollment cards, or personalized annual benefits statements, put the Trial Plaintiffs on notice that the Company reserved its right to change or terminate retiree medical benefits under

the Burroughs Plan. Defendant posits that the Company did not rely solely on the SPDs to advise plan participants that it could change or terminate the Burroughs Plan at any time. Such evidence, while perhaps relevant, does not outweigh the affirmative misrepresentations made by the Company specifically in the context of counseling its employees about retirement benefits under the Burroughs Plan. Furthermore, the presence of ROR provisions in other benefits documentation simply does not clarify any confusion created by the conflicting information the Trial Plaintiffs received in the form of oral and written affirmative misrepresentations about the retiree medical benefits. The fact that other benefits documentation contained reservation of rights provisions does not persuade the court that it was unforeseeable that a reasonable employee in the position of the Trial Plaintiffs would rely upon the misrepresentations made by the Company. Defendant's argument also ignores the significant temporal aspect of the Company's misrepresentations. The Company misrepresented the cost and duration of retiree medical benefits under the Burroughs Plan when the Trial Plaintiffs were making imminent retirement decisions, in part because of the sense of urgency created by the Company, and in the context of advising the Trial Plaintiffs specifically about the benefits the Company would provide during retirement under the Burroughs Plan.

35. The court reiterates that the Company was not simply under a "duty to remind" the Trial

Plaintiffs about the ROR provision of the SPD. Rather, when the Company communicated in the context of counseling its employees about retirement benefits, it had a duty to convey complete information that was relevant and material to the retirement decision. Thus, when the Company communicated about the cost and duration of retiree medical benefits, it had the duty to convey complete, relevant, and material information about the cost and duration of the benefits. A representation to the effect that the benefits would cost $20 per month for the retiree and then be provided at no cost for the rest of retirement or the retiree's life does not convey complete information if the Company retains the right to change or terminate those benefits at any time. The Third Circuit has cautioned that "once an ERISA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status and situation, the fiduciary has an obligation to convey complete and accurate information material to the beneficiary. This is so even if that information comprises elements about which the beneficiary has not specifically inquired." *Skinner Engine,* 188 F.3d at 130, 150 (internal citation omitted).[9] Here, the

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[9] An employee is not required to make a specific request for information as a condition precedent to a fiduciary's duty to disclose regardless of the circumstances known to the fiduciary. *Glaziers,* 93 F.3d at 1181; *Bixler,* 12 F.3d at 1300 ("Thus while the beneficiary may, at times, bear a burden of informing the fiduciary of her material circumstance, the fiduciary's obligations will not be excused merely because she failed to comprehend or ask about a technical aspect of the plan."). *See also*

(Continued on following page)

Company was aware that it was counseling the Trial Plaintiffs about retirement benefits, including retiree medical benefits, while the Trial Plaintiffs were making retirement decisions. The Company was thus obligated to convey complete and accurate information about the cost and duration of the retiree medical benefits.

36. The court again notes that there is a significant temporal aspect to the present factual scenario. The Company's lack of complete disclosure regarding its reserved right to change or terminate retiree medical benefits occurred when the Company was specifically counseling the Trial Plaintiffs about retiree benefits, at a time when the Trial Plaintiffs were making retirement decisions. The Company knew that the retirement decision was significant, that the cost of retiree medical benefits was significant, and that participation in a specific medical plan was considered a powerful motivation in the retirement decision. *See* Ex. P-130. Furthermore, in light of its integration efforts after the merger and the proposed FASB rule that changed the way retiree medical costs were recorded by the Company on its financial statements, the Company created a sense of urgency for many of the Trial Plaintiffs in making their retirement decisions, particularly for those Trial Plaintiffs who retired in the 1988-1989 time frame.

Jordan, 116 F.3d at 1016 ("[W]e have held a specific request for information is not necessarily a prerequisite for finding a fiduciary breach to inform.").

The Company repeatedly presented deadlines by which the employees needed to retire in order to secure retiree medical benefits under the Burroughs Plan. *See* Findings of Fact Nos. 69, 71, 72, 74, 75, 123, 191, 252, 278, 353. A reasonable fiduciary in this context would have foreseen that its conduct towards each of the Trial Plaintiffs would result in important decision making on his or her part based on a mistaken belief that he or she possessed guaranteed lifetime benefits.

(4) Detrimental Reliance

37. To prevail on either their affirmative misrepresentation claims or their inadequate disclosure claims, each of the Trial Plaintiffs must show that he or she relied upon the misrepresentation or the inadequate disclosure to his or her detriment. *See Burstein,* 334 F.3d at 387; *Daniels,* 263 F.3d at 73.

38. The Third Circuit has clarified that the plaintiffs in this case are not limited to proving detrimental reliance based on retirement decisions; other forms of reliance can form a valid basis of relief. *See Unisys III,* 242 F.3d at 507 ("[W]e decline Unisys' invitation to adopt an across the board prohibition of relief based upon reasonable reliance in contexts other than retirement decisions."). For example, the Trial Plaintiffs may be able to establish detrimental reliance by proving that he or she declined other employment opportunities, chose to forego the opportunity to purchase supplemental health insurance, or

made other important financial decisions for his or her retirement. *See id.*

39. At the same time, detrimental reliance in the case at bar has not been proven on a class-wide basis and the Trial Plaintiffs must prove on an individual basis the extent of the reliance and resulting harm. *In re Unisys Corp. Retiree Med. Benefit Litig.*, 2003 WL 252106, at *5 (E.D. Pa. Feb. 4, 2003).

40. *Trial Plaintiff DiLoreto.* The court finds that Trial Plaintiff DiLoreto failed to adduce evidence sufficient to show detrimental reliance. There is insufficient evidence that she relied on the Company's misrepresentations or inadequate disclosure in making her retirement decision. The court does not fully credit Ms. DiLoreto's testimony that she declined an offer to return to work at the Company after she was involuntarily laid off or that she would not have elected a reduced pension if she had known that the Company could change or terminate retiree medical benefits under the Burroughs Plan. In addition, the court does not find persuasive Ms. DiLoreto's testimony that she would not have taken expensive vacations had she known that the Company retained the right to change or terminate the Burroughs Plan, because the court credits Ms. DiLoreto's testimony that she and her husband were cautious with their expenditures as soon as they began retirement.

41. *Trial Plaintiff Gallagher.* The court concludes that Trial Plaintiff Gallagher has suffered an

injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Gallagher's testimony that participation in the Burroughs Plan was important to his retirement decision. The court further credits Mr. Gallagher's testimony that if he had not retired from Burroughs when he did, Mr. Gallagher would have continued to work until age sixty-two or sixty-five. In fact, Mr. Gallagher did work until 2003 when he was seventy-three. Although he submitted a form requesting voluntary layoff because of "personal problems (and health) at home," the court also credits Mr. Gallagher's explanation that he did not cite to participation in the Burroughs Plan as a reason for requesting voluntary layoff because he was considered key personnel and did not think that would be considered a reasonable request to leave the Company. Mr. Gallagher had previously submitted a request for retirement to his supervisor but it was rejected because Mr. Gallagher was considered key personnel. Only when a new Vice President was appointed was his retirement request accepted in March 1989.

42. *Trial Plaintiff Walnut.* The court concludes that Trial Plaintiff Walnut has failed to adduce evidence sufficient to show detrimental reliance. Although he contends that he agreed to the settlement of his claims with the Company on the basis that the Settlement Agreement was based on

the terms of the 1986 VRIP, the Settlement Agreement does not state that he would receive such benefits. Rather, the Settlement Agreement merely states that he would receive medical benefits "in accordance with Unisys policy." The Settlement Agreement also contains an integration clause which states that it contains the "entire agreement" of the parties. The court finds that there is insufficient evidence that Mr. Walnut relied on the Company's misrepresentations in making his retirement decision.

43. *Trial Plaintiff Peterman.* The court concludes that Trial Plaintiff Peterman has suffered an injury because of her reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Ms. Peterman's testimony that she would have continued working if she had known at the time that she retired that the Company had the right to change the cost of the medical benefits or that the Company was thinking of changing medical benefits. She was in good health at the time of her retirement and would have continued working if her health permitted.

44. *Trial Plaintiff Castorani.* The court concludes that Trial Plaintiff Castorani has suffered an injury because of her reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or

terminated. The court credits Ms. Castorani's testimony that she would have continued working in order to increase her pension accrual and to earn additional salary if she had known at the time that she retired that the Company had the right to change the cost of retiree medical benefits or terminate the Burroughs Plan. In addition, the court finds credible Ms. Castorani's testimony that if she had known that the Company could change or terminate retiree medical benefits under the Burroughs Plan, she would have sought full-time employment that provided benefits after she retired from the Company rather than working part-time.

45. *Trial Plaintiff Geneva.* The court concludes that Trial Plaintiff Geneva has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Geneva's testimony that he retired at the time he did because he wanted to be guaranteed that the cost of his medical benefits in retirement would be as the Company had represented, $20 per month until age sixty-five and then free for the rest of his life. The court further finds credible Mr. Geneva's testimony that he would have continued working if he had known that he would incur medical costs other than as the Company had represented. Thus, the court finds that the Company's representations and inadequate disclosures influenced the timing of Mr. Geneva's retirement.

46. *Trial Plaintiff Stringer.* The court concludes that Trial Plaintiff Stringer has suffered an injury because of her reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Ms. Stringer's testimony that she would not have retired when she did, and that she would have continued working until age sixty-five, if she had been told in her meeting with the human resources representative about retirement benefits that the retiree medical benefits could be changed or terminated. The court finds credible Ms. Stringer's testimony that she also would not have gifted money to her granddaughter or had a swimming pool installed if she had known that the Burroughs Plan was going to change and that she would have to pay the cost of retiree medical benefits.

47. *Trial Plaintiff Hansell.* The court concludes that Trial Plaintiff Hansell has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Hansell's testimony that he retired when he did in order to secure retiree medical benefits under the Burroughs Plan and that he would have continued working until age sixty-five, if he had known that the retiree medical benefits could be changed or terminated. In fact, Mr. Hansell retired from Unisys at age sixty-two pursuant to a voluntary

layoff program, but continued to work as a contractor for three years and ceased working at age sixty-five.

48. *Trial Plaintiff Yeager.* The court concludes that Trial Plaintiff Yeager has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Yeager's testimony that if he had known that the Company had the right to change or terminate the Burroughs Plan at any time, he would not have retired when he did. Mr. Yeager retired at age sixty-two, but would have worked until age sixty-five. The court also finds credible Mr. Yeager's testimony that participation in the Burroughs Plan was the most significant consideration in his decision to retire at the time he did.

49. *Trial Plaintiff Ginsberg.* The court concludes that Trial Plaintiff Ginsberg has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Ginsberg's testimony that he retired when he did in order to secure retiree medical benefits under the Burroughs Plan, with the cost structure and duration as represented by the Company. If, at the time he made his retirement decision, Mr. Ginsberg had known that the Company could change retiree medical benefits such that he would pay the current cost, he would not have retired

at that point and would have continued to work. The court also finds credible Mr. Ginsberg's testimony that initially he had intended to retire from his position with the Company and seek other employment in the Company. However, Mr. Ginsberg was unable to do so given the time frame within which he had to retire in order to secure retiree medical benefits under the Burroughs Plan.

50. *Trial Plaintiff Horshaw.* The court concludes that Trial Plaintiff Horshaw has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Horshaw's testimony that he believed that Burroughs employees received a lower salary in exchange for free lifetime medical benefits. The court also finds credible Mr. Horshaw's testimony that he retired when he did in order to secure retiree medical benefits under the Burroughs Plan and that he depended on the promise of free lifetime medical benefits in making his decision to retire from Burroughs. If he had known that the Company could change or terminate the retiree medical benefits such that they would not be provided at no cost for his lifetime, Mr. Horshaw would have left the Company earlier to seek other employment.

51. *Trial Plaintiff Botzum.* The court concludes that Trial Plaintiff Botzum has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding

whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Botzum's testimony that the Company's representation of free, lifetime benefits was instrumental in his decision to retire. Mr. Botzum retired when he did in order to secure retiree medical benefits under the Burroughs Plan. If he had not been told by the Company that he would receive free medical benefits after age sixty-five, he would not have retired at that time. Mr. Botzum was fifty-six at the time he retired pursuant to a voluntary workforce reduction. The court further finds credible Mr. Botzum's testimony that he would have continued to work until age sixty-two or sixty-five. In fact, after he left the Unisys Plan because of its cost, Mr. Botzum began working full-time so that he could receive benefits.

52. *Trial Plaintiff Endress.* The court concludes that Trial Plaintiff Endress has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Endress' testimony that he retired when he did in order to secure retiree medical benefits under the Burroughs Plan and that he would have continued working until at least age sixty-five, if he had known that the retiree medical benefits could be changed or terminated. Mr. Endress was fifty-seven at the time he retired pursuant to a voluntary workforce reduction. Although there is no assurance

that Mr. Endress would have been recalled to employment with the Company, the court also credits Mr. Endress' testimony that he would not have purchased a beer distributorship in August 1989 (five months after his retirement from the Company) if he had known at the time he retired that the Company retained the right to change or terminate retiree medical benefits under the Burroughs Plan.

53. *Trial Plaintiff Schieman.* The court concludes that Trial Plaintiff Schieman has suffered an injury because of his reasonable reliance on the Company's representations and inadequate disclosures regarding whether retiree medical benefits under the Burroughs Plan could be changed or terminated. The court credits Mr. Schieman's testimony that receipt of retiree medical benefits under the Burroughs Plan was pivotal to his decision to retire and that if he had understood that the Company reserved the right to change or terminate the plan, he would not have retired when he did. Mr. Schieman wanted to retire, as opposed to being laid off, because if he retired he was eligible to receive medical benefits under the Burroughs Plan. Had he been laid off, Mr. Schieman would have received benefits under the Unisys PRM Plan, which he felt was an inferior plan. Participation in the Burroughs Plan was the most important part of Mr. Schieman's retirement decision because he was able to plan his future finances on the basis of low-cost out-of-pocket payments and premiums. Although Mr. Schieman's department was to be eliminated in May 1989, the

court finds credible his testimony that the department's workload was redistributed and he had a chance of continuing to work for the Company in another division and would have sought such a position. *See* Ex. D-262 (letter dated March 22, 1989 from Betty Burdette advising Mr. Schieman that he will be considered for job openings for one year from the date of his layoff). Moreover, the court credits Mr. Schieman's testimony that if he had not retired, but was unable to find employment in another department within the Company, Mr. Schieman would have sought employment outside the Company.

54. Thus, the court concludes that Trial Plaintiffs Gallagher, Peterman, Castorani, Geneva, Stringer, Hansell, Yeager, Ginsberg, Horshaw, Botzum, Endress and Schieman have established a claim for breach of fiduciary duty.

55. In contrast, the court concludes that Trial Plaintiffs DiLoreto and Walnut have failed to establish a claim for breach of fiduciary duty.

C. Statute of Limitations Defense

56. Section 413 of ERISA sets forth the relevant statute of limitations for Trial Plaintiffs' breach of fiduciary duty claims. Section 413 of ERISA provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

57. The statue [sic] of limitations is an affirmative defense and the burden of proof falls on the defendant. *See Richard B. Roush, Inc. Profit Sharing Plan v. New England Mut. Life Ins. Co.*, 311 F.3d 581, 585 (3d Cir. 2002).

58. The court notes that the Trial Plaintiffs' claims are not barred by ERISA's six-year statute of limitations under section 413(1), 29 U.S.C. § 1113(1). In *Unisys III*, the Third Circuit found that the six-year statute of limitations runs from the date of the last action of detrimental reliance by each plaintiff. *Unisys III*, 242 F.3d at 505-06. Here, the date of detrimental reliance by each Trial Plaintiff occurred, at the earliest, after December 3, 1986. The retirement date or date of termination of employment with the Company of each of the Trial Plaintiffs occurred after December 3, 1986. To the extent the

court has found that a Trial Plaintiff detrimentally relied in a way other than a retirement decision, such reliance also occurred after the relevant retirement date or date of termination of employment with the Company. Moreover, the claims relate back to the original filing date of this action, December 2, 1992. Thus, none of the Trial Plaintiff's [sic] claims is barred by ERISA's six-year statute of limitations.

59. Defendant contends, however, that the Trial Plaintiffs' claims are time-barred by the three-year statute of limitations found in section 413(2) of ERISA. Defendant claims that the trial record demonstrates that the Trial Plaintiffs had actual knowledge of the claimed fiduciary breach more than three years prior to the commencement of this current action on December 2, 1992. In support of this proposition, defendant contends that (1) within two months of their retirement each Trial Plaintiff received the retiree SPD which contained the ROR provision; (2) each Trial Plaintiff signed a COBRA form which set forth the Company's right to change the Burroughs Plan; and (3) each Trial Plaintiff was given materials in November of 1989 describing a reduction in the level of prescription benefits available to retirees under the Burroughs Plan. Defendant argues that such evidence amounted to an open announcement of the Company's right to change retiree medical benefits. *See* Def.'s Proposed Conclusions of Law Nos. 76-81.

60. Section 413 of ERISA "sets a high standard for barring claims against fiduciaries prior to the

expiration of the section's six-year limitations period." *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1176 (3d Cir. 1992). *See also Roush,* 311 F.3d at 587 (noting "we have interpreted the actual knowledge requirement 'stringently' ").

61. The Third Circuit interpreted the "actual knowledge" standard in section 413(2) of ERISA as "requiring not only actual knowledge of the facts giving rise to the fiduciary violation but also as requiring actual knowledge that those facts support a cause of action under ERISA." *Roush,* 311 F.3d at 585 (citing *Montrose Med. Group Participating Sav. Plan v. Bulger,* 243 F.3d 773, 787 (3d Cir. 2001)). *Accord Cetel v. Kirwan Fin. Group, Inc.,* 2006 WL 2466855, at *10 (3d Cir. Aug. 28, 2006).

62. In other words, "actual knowledge of a breach or violation requires knowledge of all relevant facts at least sufficient to give the plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated." *Roush,* 311 F.3d at 585 (citing *Gluck,* 960 F.2d at 1178). Such knowledge could come from necessary opinions of experts, knowledge of a transaction's harmful consequences, or even actual harm. *Id.* (citations omitted). In describing its findings in *Gluck,* the Third Circuit pointed out that under the facts of that case the participants could not have knowledge of an ERISA violation where the amendment to the plan did not disclose its harmful consequences. *Id.* The court also noted that under the circumstances of *Gluck,* for a participant to realize that he had a cause of action he had to review the

plan document and balance sheet and that this level of research and scrutiny was inconsistent with section 1113's actual knowledge standard. *Id.* (internal citations and quotations omitted).

63. Thus, the two-prong test set forth in *Montrose* requires the defendant to prove (1) that the claimant knows the facts on which he relies to establish a fiduciary duty, and (2) that the claimant knows that he has a cause of action under ERISA which includes "actual knowledge" of harm inflicted or harmful consequences. *Roush,* 311 F.3d at 587.

64. Contrary to defendant's assertion, the court finds that receipt of the retiree SPD does not establish actual knowledge on the part of the Trial Plaintiffs of harm inflicted or harmful consequences. As an initial matter, only Trial Plaintiffs Walnut, Hansell, Ginsberg, Geneva and Schieman testified that they received the retiree SPD. Although it may have been available upon request from the human resources department, the record confirms that it was the Company's practice to distribute the retiree SPD to employees only after they had retired and enrolled in the Burroughs Plan. In any event, for a Trial Plaintiff to have discerned a cause of action from receipt of the retiree SPD would require review of the SPD and identification of the ROR provision on page twenty-eight of a thirty-nine page booklet. This level of research and scrutiny is inconsistent with section 413's actual knowledge standard, particularly in light of the various affirmative misrepresentations that the Company had made to the Trial Plaintiffs. Review of

the retiree SPD by a Trial Plaintiff at that point in time does not establish that he knew that he had a cause of action under ERISA which includes "actual knowledge" of harm inflicted or harmful consequences.

65. Furthermore, neither execution by a Trial Plaintiff of a COBRA form nor the Company's announcement that it was changing the level of prescription benefits establishes that the Trial Plaintiffs had actual knowledge of a breach of fiduciary duty. Defendant has failed to establish that even if a Trial Plaintiff reviewed the ROR provision on one of the various COBRA forms, such Trial Plaintiff would have actual knowledge that the ROR provision applied to retiree medical benefits under the Burroughs Plan. The link between the ROR provision of a COBRA form to the ROR in the retiree SPD is simply too attenuated in light of the Company's representations about the cost and duration of retiree medical benefits. Similarly, the announcement by the Company that it was changing the level of prescription benefits does not disclose to the Trial Plaintiffs harmful consequences of the Company's misrepresentations about the cost and duration of retiree medical benefits under the Burroughs Plan. In addition, for the Trial Plaintiffs to discern a cause of action for breach of fiduciary duty from the execution of a COBRA form or from the receipt of announcement about changes to prescription drug coverage would have required a level of

research and scrutiny inconsistent with section 1113's actual knowledge standard.

66. Contrary to defendant's assertion, the Third Circuit's holding in *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996) does not warrant a different conclusion. In *Kurz*, the Third Circuit applied ERISA section 413(2)'s three-year statute of limitations and found that the day the defendant announced a pension increase, all the material elements of a breach of fiduciary duty claim were *patently obvious*. *Id.* at 1551 (emphasis added). There, the court found that the announcement was "not a technical violation of ERISA, nor a cleverly concealed plan amendment." *Id.* Because the defendant openly announced that certain employees would receive better benefits, and others would not, the harmful consequences of the change were obvious. *Id.* In the case at bar, however, neither the execution of a COBRA form nor the announcement that the Company was changing the level of prescription drug benefits made the harmful consequences of the Company's breach of fiduciary duty patently obvious to the Trial Plaintiffs. These actions did not alert the Trial Plaintiffs to the harmful consequences like the "open announcement" of improved benefits in *Kurz*.

67. The court thus concludes that the Trial Plaintiffs' breach of fiduciary duty claims are not time-barred by the three-year statute of limitations found in ERISA section 413(2), 29 U.S.C. § 1113(2).

D. Relief

68. As noted above, Trial Plaintiffs Gallagher, Peterman, Castorani, Geneva, Stringer, Hansell, Yeager, Ginsberg, Horshaw, Botzum, Endress and Schieman have established claims for breach of fiduciary duty. Hereinafter, Trial Plaintiffs Gallagher, Peterman, Castorani, Geneva, Stringer, Hansell, Yeager, Ginsberg, Horshaw, Botzum, Endress and Schieman are referred to as the "Prevailing Plaintiffs." Trial Plaintiffs DiLoreto and Walnut have not prevailed on their claims and, accordingly, are not entitled to relief.

69. Prevailing Plaintiffs request the court to enter an injunction ordering the Company to do four things:

1. enjoining defendant to restore the benefits that were applicable to each plaintiff under the Plan before the company terminated the Plan;

2. ordering a reformation of the Plan to eliminate and declare invalid any provision purporting to reserve an employer's right to modify or terminate the Plan with respect to participants who had begun to receive benefits under the Plan, such as plaintiffs;

3. enjoining defendant to reinstate the Plan as so reformed; and

4. ordering defendant to make restitution to each plaintiff in an amount equal to

> the greater of (a) the financial burdens and detriments which defendant shifted to each plaintiff, including medical plan premiums and other increased cost obligations under the company's replacement medical plan and/or under other sources of medical coverage used by each plaintiff, as well as lost salary, pension accruals and other benefits lost due to employees' decisions to stop working and/or commence their pensions on dates which were earlier than would have occurred in the absence of the violation, and (b) the amount of financial advantage gained by defendant as a result of its violation, including costs collected from each plaintiff under the company's replacement medical plan or otherwise avoided or shifted to each plaintiff, as well as the costs of salary, pension accruals and other benefits avoided by the company due to employees' decisions to stop working and/or commence their pensions on dates which were earlier than would have occurred in the absence of the violation.

(Pls.' Proposed Findings of Fact and Conclusions of Law at 145; Pls.' Am. Compl. at 10.)

(1) **Monetary Relief**

70. The Prevailing Plaintiffs' breach of fiduciary duty claims are brought pursuant to ERISA section 502(a)(3) which states in pertinent part, that:

> A civil action may be brought –
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter, or the terms or the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce the provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

71. The Supreme Court in *Great-West Life & Annuity Insurance Co., v. Knudson,* 534 U.S. 204, 210-21 (2002) held that only equitable relief may be obtained for a breach of fiduciary duty under ERISA. The Court explained that "'equitable' relief must mean *something* less than *all* relief." *Id.* at 209 (quoting *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 258 n.8 (1993)).

72. In *Mertens v. Hewitt Associates,* 508 U.S. 248 (1993), the Court rejected an interpretation of ERISA that would extend the relief obtainable under section 502(a)(3) to whatever relief a court of equity is empowered to provide. The Court concluded that such a reading would "render the modifier [equitable] superfluous." *Id.* at 257-58. Rather, the term "equitable relief" in section 502(a)(3) must refer to "those categories of relief that were *typically* available in equity." *Great-West,* 534 U.S. at 210 (quotations omitted).

73. The Supreme Court in *Great-West* emphasized that a claim for money damages is the "classic form of *legal* relief." *Id.* at 210 (quoting *Mertens,* 508 U.S. at 255). The Court explained as follows:

> [I]nvariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for "money damages," as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from defendant's breach of legal duty.

534 U.S. at 210 (quoting *Bowen v. Massachusetts,* 487 U.S. 879, 918-19 (1988) (Scalia, J. dissenting)).

74. Under a claim for "restitution," the Prevailing Plaintiffs seek recovery of back wages and pension benefits, medical premiums paid to the Unisys Plan, medical premiums paid for other medical insurance, and other losses the Prevailing Plaintiffs allegedly incurred. The Prevailing Plaintiffs also request payment of monies that represent the amount the Defendant financially gained from the Prevailing Plaintiffs' decisions to retire from employment with Defendant.

75. The Prevailing Plaintiffs' "restitution" claim is not one typically available in equity; as such, it is unavailable under ERISA section 502(a)(3). The Supreme Court has held that "one feature of equitable restitution was that it sought to impose a constructive trust or equitable lien on 'particular

funds or property in the defendant's possession.'" *Sereboff v. Mid-Atl. Med. Serv., Inc.*, 126 S. Ct. 1869, 1874 (2006) (quoting *Great-West*, 534 U.S. at 213.)

76. In contrast to *legal* restitution, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213.

77. The relief the Prevailing Plaintiffs seek here cannot be considered a request for equitable restitution or one implicating a constructive trust because under *Sereboff* and *Great-West*, such remedies are appropriate only when the specific property sought is identifiable and in the hands of the defendant. In this case, Prevailing Plaintiffs' claims for back wages and pension benefits, medical premiums paid to the Unisys Plan, medical premiums paid for other medical insurance and disgorgement of Defendant's financial gains, would be paid from the general funds of Defendant and not from identifiable property held by Defendant that could be traced from the Prevailing Plaintiffs to Defendant.

(2) **Specific Performance and Reformation**

78. The Prevailing Plaintiffs request the court to order Defendant to restore each of them to the Burroughs Plan as it existed prior to the Company's

decision to modify the plan to exclude free medical coverage to the plaintiffs. This request for specific performance is a traditional equitable remedy that is available under ERISA section 502(a)(3). *See* 3 D. Dobbs, *Law of Remedies* § 12.8(1) at 191 (2d ed. 1993) ("The specific performance decree originated in the old equity courts and continues today to be thought of as an equitable remedy, with the usual attributes of such remedies."); 4 J. Pomeroy, *A Treatise On Equity Jurisprudence* § 1401 at 1033 (5th ed. 1941) ("The remedy of the specific performance of contracts is purely equitable.").

79. Defendant alleges that the Burroughs Plan no longer exists. In the words of defense counsel, "there's no Burroughs Medical Plan; it's gone, history." (N.T. 2/13/06 at 77 (closing argument).)

80. Because the plan in which the Prevailing Plaintiffs participated no longer exists, and they were promised that the plan would provide medical coverage at no cost at age sixty-five, this court recommends that the court grant equitable relief to the Prevailing Plaintiffs by way of a decree ordering Defendant to restore the Burroughs Plan as it existed at the time each Prevailing Plaintiff retired, or that Defendant create a new medical plan with identical provisions as the Burroughs Plan.

81. In the event the court adopts this Recommendation and enters a decree, as described above, this court further recommends that the restored Burroughs Plan be reformed so as not to include a

ROR provision allowing Defendant to terminate the plan or to modify it so as to eliminate the "no premium" feature of the plan for retirees age sixty-five and over. In all other respects, the ROR provision should remain in effect.

82. Reformation is an equitable remedy. *H. Prang Trucking Co., Inc. v. Local Union No. 469,* 613 F.2d 1235, 1239 (3d Cir. 1980). *See also Ivinson v. Hutton,* 98 U.S. 79, 82 (1878) ("Power to reform written contracts for fraud or mistake is everywhere conceded to courts of equity, and it is equally clear that it is a power which cannot be exercised by common-law courts."). Reformation of an ERISA plan may be appropriate where there is a unilateral mistake on the part of the plaintiff coupled with fraud or its terms violate ERISA. *Kawski v. Johnson & Johnson,* 2005 WL 3555517, at *7 (W.D.N.Y. Dec. 19, 2005). *See also Simmons Creek Coal Co. v. Doran,* 142 U.S. 417, 435 (1892) ("The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other is undoubted. . . ."); 2 D. Dobbs, *Law of Remedies* § 11.6(1) at 747 (2d ed. 1993) ("Reformation is also allowed when one party is mistaken, and writes down the agreement in an erroneous way, and the other party knows of the mistake. Courts grant relief in such cases on the ground that time was a mistake on one side and fraud or inequitable conduct on the other."); *Restatement (Second) Contracts* § 153 cmt. a. (1981) (In the case of unilateral mistake, "relief has been granted where

the other party actually knew or had reason to know of the mistake at the time the contract was made or where his fault caused the mistake.").

83. As set forth in the court's Findings of Fact, Defendant breached its fiduciary duties to the Prevailing Plaintiffs under ERISA. Defendant knew that when the Prevailing Plaintiffs relied to their detriment upon Defendant's misrepresentations and omissions, they were acting under the mistaken belief that they had guaranteed free medical insurance for life after they reached age sixty-five and the company could not terminate that benefit. Despite this knowledge, Defendant did not disclose to the Prevailing Plaintiffs at the relevant times that the Company retained the right to terminate the Burroughs Plan. Thus, the court under its equitable power can reform the restored Burroughs Plan to eliminate the right of the Company to terminate medical benefits for the Prevailing Plaintiffs or to require the Prevailing Plaintiffs to pay premiums for medical coverage under the restored Burroughs Plan. Through their misrepresentations and omissions, Defendant created in the Prevailing Plaintiffs the expectation that each would receive free medical benefits under the Burroughs Plan during retirement after the age of sixty-five. In order to meet this expectation, the court must order Defendant to not only provide free medical benefits to the Prevailing Plaintiffs under the Burroughs Plan or an identical plan, but also must eliminate Defendant's right to

terminate such benefits with respect to the Prevailing Plaintiffs.

84. Under the facts of the present case, because the Prevailing Plaintiffs were mistaken as to material facts concerning their retiree medical benefits, the Prevailing Plaintiffs accordingly also were mistaken as to the legal ability of the Company to terminate the Burroughs Plan.[10] A mistake of law by one party, induced or brought about by inequitable conduct of the other, can be remedied in a court of equity. As one leading commentator has stated:

> Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or

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[10] *See Restatement (Second) of Contracts* § 151 (1981) (A mistake is "a belief that is not in accord with the facts."). The Restatement does not make a distinction between a mistake of the facts and mistake of the law. *See* § 151 cmt. b.

> misleading statements, or acts of the other party.

3 J. Pomeroy, *A Treatise On Equity Jurisprudence* § 847 at 304 (5th ed. 1941).

85. The Prevailing Plaintiffs were mistaken as to the legal ability of the Company to terminate the Burroughs Plan or to change the feature of the Plan that provides no payment of premiums at age sixty-five. As described above, this mistake was caused by the misrepresentations and non-disclosures of the Company, in violation of the Company's fiduciary obligations under ERISA. In such circumstances, the court should exercise its equitable power and reform the plan document to conform it to the reasonable expectations of the Prevailing Plaintiffs.

For all the above reasons, the court makes the following

RECOMMENDATION

AND NOW, this 29th day of September 2006, it is respectfully recommended that the Court ORDER and DECREE the following:

1. The Company shall restore the benefits that were applicable to each Prevailing Plaintiff under the Burroughs Plan before the Company terminated the Burroughs Plan or create an identical plan without the ROR provision as explained below;

2. The Burroughs Plan shall be reformed to eliminate and declare invalid any provision purporting to reserve to the Company the right to (a) terminate the Burroughs Plan with respect to the Prevailing Plaintiffs, and (b) require Prevailing Plaintiffs to pay premiums after age sixty-five for medical coverage under the restored Burroughs Plan. In all other respects, the ROR provision should remain in effect;

3. The Company shall reinstate the Burroughs Plan as so reformed or create a new plan identical to the Burroughs Plan as reformed; and

4. Judgment be entered: (a) in favor of the Prevailing Plaintiffs and against Defendant on their claims;[11] and (b) in favor of Defendant and against Trial Plaintiffs DiLoreto and Walnut on their claims.

BY THE COURT:

/s/ TJR
THOMAS J. RUETER
United States Magistrate Judge

[11] Plaintiffs' request for reasonable costs and expenses, pre- and post-judgment interest and attorneys fees is premature. Such request should be addressed to Judge Kauffman if judgment is entered in favor of plaintiffs.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-3369, 08-3025 and 08-3545

IN RE: UNISYS CORPORATION RETIREE
MEDICAL BENEFITS ERISA LITIGATION

HARLEY J. ADAIR, ET AL.

v.

UNISYS CORPORATION,

Appellant

Nos. 07-3491 and 08-3430

IN RE: UNISYS CORPORATION RETIREE
MEDICAL BENEFITS ERISA LITIGATION

HARLEY J. ADAIR, ET AL.

v.

UNISYS CORPORATION

THEODORE F. BOTZUM; MARY P. CASTORANI;
ERNESTINE DILORETO; EUGENE P. ENDRESS;
DENNIS F. GALLAGHER; HENRY GENEVA;
ELI U. GINSBERG; HOWARD B. HANSELL;
CHERRY L. SAVAGE, Executrix of the Estate
of Vernon Horshaw; HELEN M. PETERMAN;

ROBERT J. SCHIEMAN; RUTH P. STRINGER;
ANNE S. WALNUT; THOMAS W. YEAGER,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 03-cv-03924)
District Judge: Honorable Bruce W. Kauffman

Present: SCIRICA, *Chief Judge*,
SLOVITER, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN and
HARDIMAN, *Circuit Judges*.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

The petition for rehearing filed by Unisys Corporation having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ *D. Michael Fisher*
Circuit Judge

Dated: October 2, 2009
smw/cc: All Counsel of Record

Supreme Court, U.S.
FILED
FEB 3 - 2010
OFFICE OF THE CLERK

No. 09-789

In The Supreme Court of the United States

UNISYS CORPORATION,

Petitioner,

v.

HARLEY J. ADAIR, *et al.*,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Unisys Corporation. The Chamber is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the litigants. Accordingly, the Chamber has participated *amicus curiae* in the following ERISA cases recently heard by this Court: *Conkright v. Frommert*, No. 08-810 (argued January 20, 2010), *Metropolitan Life Ins.*

Co. v. Glenn, ___ U.S. ___ (2008), *LaRue v. DeWolff, Boberg & Associates, Inc.*, ___ U.S. ___ (2008).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to unanticipated liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for many prior years. We believe this Court's review is urgently needed.

Counsel of record received timely notice of intent to file this brief (on January 15, 2010). Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of the

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Counsel of record received timely notice of intent to file this brief (on January 15, 2010, which is more than ten days prior to the due date). Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

litigants. Accordingly, the Chamber has participated *amicus curiae* in the following ERISA cases recently heard by this Court: *Conkright v. Frommert*, No. 08-810 (argued January 20, 2010), *Metropolitan Life Ins. Co. v. Glenn*, ___ U.S. ___ (2008), *LaRue v. DeWolff, Boberg & Associates, Inc.*, ___ U.S. ___ (2008).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to unanticipated liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for many prior years. We believe this Court's review is urgently needed.

SUMMARY OF ARGUMENT

In the decision below, the Third Circuit held that a fiduciary of an ERISA-covered employee benefit plan, such as a plan administrator, breaches his fiduciary duty if he accurately describes the then-current terms of the plan in response to an inquiry from an employee but fails to remind the employee

that the employer has reserved the right to amend or terminate the plan. This is despite the fact that the comprehensive and detailed disclosure provisions of ERISA require only that such a reminder appear in the summary plan description, which is provided to all participants. The penalty for that breach, according to the Third Circuit, is that any amendment reducing the benefit (or terminating the plan) is unenforceable against that employee.

The holding of the Third Circuit is exceptionally important because it throws into doubt the terms of virtually all employee benefit plans covered by ERISA, and there are considerably more than 5 million of them. That is because virtually all of them have been amended repeatedly since ERISA was enacted (and many have been terminated), but plan administrators have never understood their responsibility to include the duty imposed by the decision below, namely, to remind employees in every oral and written communication that the employer has reserved the right to amend or terminate the plan. If it really is a breach of fiduciary duty not to remind employees in every discussion of benefits under the plan that the employer reserves the right to amend or terminate the plan, it is a breach that has been committed daily by the administrators of millions of employee benefit plans ever since ERISA was enacted.

The question presented is also exceptionally important because of how seriously it affects employee benefit plans. Absent such disclosures as the Third

Circuit now seeks to require, the decision below has the practical effect of "freezing" the various different terms of every plan at various different points in time with respect to various different participants, all based on the accident of who asked about what provisions at what times in the past. Under the decision below, instead of presenting a coherent picture of the benefits to which all participants are entitled, the plan document under ERISA is suddenly exploded into a pixelated mishmash of different benefits frozen in time for different participants. And plans previously thought terminated may be resurrected simply because employees were not orally advised of the employer's reserved right to terminate the plan.

The national uniformity which is the capstone of ERISA, and the supremacy of the written plan document, will be shattered as employees and retirees institute claims that they must be afforded benefits without regard to particular plan amendments (or even termination of the plan) because they were never advised of the employer's reserved right to amend or terminate the plan when they made inquiries about their benefits. This will draw plan administrators into expensive investigations of who told whom what and when. It will also inevitably spill over into the federal courts either as employees and retirees press their claims or as plan administrators exercise their right to seek instructions as to what the terms of their plans are.

For the future, plan administrators will face an equally unappetizing prospect. They must (i) stop communicating with employees except through the statutory methods such as the summary plan description, or (ii) they must compel their staffs to issue Miranda-type warnings, in every oral and written communication with a participant, that the employer reserves the right to amend or terminate the plan, or (iii) they must adopt a policy of handing out another copy of the summary plan description every time they communicate with a participant – an expensive and wasteful predicament in which Congress could never have intended to place administrators.

Put simply, if the terms of virtually all welfare plans (and many pension plans) are presently uncertain without individualized inquiry into which amendments can be applied to which employees, depending on what they were told and when, *plan administrators need to know now*. And, for the future, if their fiduciary duty under ERISA requires the wasteful, duplicative disclosures necessitated by the decision below, *plan administrators need to know now*.

ARGUMENT

THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT BECAUSE THE ANSWER GIVEN BELOW THROWS INTO DOUBT THE TERMS OF MILLIONS OF EMPLOYEE BENEFIT PLANS, VISITING ENORMOUS UNINTENDED COSTS ON EMPLOYERS AND BURDENING THE FEDERAL COURTS WITH A NEW CLASS OF ERISA LITIGATION.

In the October 1994 Term, the Court granted *certiorari* and reversed a decision of the U. S. Court of Appeals for the Third Circuit that cast into doubt the terms of virtually all single-employer employee benefit plans covered by ERISA, by calling into question the validity of plan amendments that had been made to them over many years. *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995). Literally millions of employee benefit plans were affected, and the Third Circuit's decision would have imposed enormous unintended costs on employers large and small, as well as stimulating a flood of ERISA lawsuits in the federal courts.

Utilizing a different theory this time, the Third Circuit has once again cast into doubt the terms of millions of employee benefit plans covered by ERISA, once again by calling into question the validity of plan amendments that have been made to them over many years. The Chamber of Commerce of the United States of America (the "Chamber") wholeheartedly agrees with Petitioner as to the conflict among the Circuits and the plain error of the decision below. We

write separately, as we did in *Curtiss-Wright*, in order to bring to the Court's attention the tremendously harmful effect of the decision below on employers, large and small, and the employee benefit plans that they maintain, as well as the threat to the federal courts.

A. The Decision Below Calls into Question the Validity of Amendments Made Over Many Years to Employee Benefit Plans under ERISA, Principally Health and Welfare Plans.

The decision below holds that, if a plan administrator or other fiduciary of an ERISA-covered employee benefit plan accurately describes a then-current benefit of the plan to an employee but fails to remind the employee that the plan can be changed at any time, then that benefit cannot thereafter be taken away from that employee, even through the exercise of a properly reserved right to amend or terminate the plan. In this case, the employees inquired about post-retirement health coverage and were accurately told the then-current terms of the plan – that the benefit lasted throughout retirement and came at low cost to the retiree. Moreover, at that time, there was no intention to change the terms of the plan.

Years later, the employer chose to exercise its right to amend or terminate the plan by replacing it with a new plan, in which retirees were charged for

their health coverage in increasing stages over a period of years until eventually retirees would be paying the full cost. All along, the right to amend or terminate had been properly reserved in the plan document in accordance with this Court's decision in *Curtiss-Wright v. Schoonejongen* and properly disclosed to participants in the summary plan description as required by ERISA. But, in answering the employees' questions years earlier, the employer had not reminded the employees that the plan could be amended at any time. Accordingly, the Third Circuit held that the employer had forfeited its right to replace the plan with another so as to increase the charge due from these employees, meaning that the employer had to continue to provide these employees with vested, low-cost retiree health insurance notwithstanding its reserved right to amend or terminate the plan.

Thus, according to the Third Circuit, the critical right to amend or terminate an employee benefit plan, even if properly reserved in the plan document and disclosed to employees in the summary plan description as required by ERISA, is permanently lost as to any given employee who asks about the plan and is given an accurate answer but is not reminded in the same breath of the employer's right to amend or terminate. The applications of this new doctrine are almost limitless:

– An applicant asks at the job interview whether the health plan pays for transplants, because his wife may need one shortly. The employer's representative

answers yes (because it does and there is no intention to change the plan) but fails to add that the employer reserves the right to amend the plan. The applicant takes the job, preferring it to other offers because of coverage for transplants. Three years later, the employer amends the plan to eliminate coverage for transplants. According to the Third Circuit, the plan must still cover a transplant for this employee's wife, in complete derogation of the plan amendment that was properly reserved, communicated and adopted.

– An employee asks what the long-term disability benefit is. The employer's representative says, "66-2/3 percent of pay until age 65," because that is what the plan provides, but fails to add that the employer reserves the right to amend the plan. Later, the employer amends the long-term disability plan to reduce the benefit to 60 percent of pay until age 65. This employee, having foregone other employment opportunities, suffers long-term disability. According to the Third Circuit, because the employer did not remind the employee of the employer's reserved right to amend the plan, the pre-existing terms of the plan continue to apply to this employee, who therefore gets a benefit of 66-2/3 percent of pay, notwithstanding the amendment.

– An employee asks what the rate of matching contributions is under the employer's 401(k) plan. The employer's representative says, "Dollar for dollar up to 6 percent of pay," because that is what the plan provides, but does not remind the employee that the employer reserves the right to amend the plan. The

employee foregoes other employment opportunities because of the rich matching contribution. Some years later, due to an economic downturn, the employer amends the 401(k) plan to eliminate the matching contribution. According to the Third Circuit, the employer must continue to match this employee's 401(k) contributions dollar for dollar up to 6 percent of pay, because, as to this employee, it has forfeited the right to amend the plan to reduce the rate of match.

Absent such disclosures as the Third Circuit now seeks to require, the decision below has the practical effect of "freezing" the various different terms of every plan at various different points in time with respect to various different participants, all based on the accident of who asked about what benefits at what times in the past. Under the decision below, instead of presenting a coherent picture of the benefits to which all participants are entitled, the plan document under ERISA is suddenly exploded into a pixelated mishmash of different benefits frozen in time for different participants. What is more, plans that employers believe to have been terminated may now be resurrected as applied to certain employees or retirees, depending on an individualized investigation into what they were told on any historical occasion when they inquired about the terms of the plan.[2]

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[2] The remedy in this case was precisely that – resurrecting a plan that had been properly terminated and replaced – as the Third Circuit recognized, characterizing the remedy as "reinstating the Burroughs Medical Plan for these twelve

(Continued on following page)

B. The Decision Below Affects Virtually All Employee Benefit Plans under ERISA – Numbering in the Millions – Because Plan Administrators Have Never Observed Any Such Rule As It Would Impose.

The theory adopted by the decision below is breach of fiduciary duty – that failure to remind the employee of the employer's reserved right to amend the plan when answering a question from the employee breaches the plan administrator's fiduciary duty to provide the employee with all information known to the plan administrator that might be important to the employee. It is tempting to view the case, therefore, as an isolated incident of breach of fiduciary duty. But that would be a mistake because, if this really is a breach of fiduciary duty, *it is a breach that has been committed daily by the administrators of millions of plans ever since the enactment of ERISA in 1974.*

Far from being isolated and fact-specific, the question presented affects virtually all employee benefit plans covered by ERISA, because plan administrators have never been aware of any requirement such as

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plaintiffs and enjoining Unisys from making any changes to the plan." 34a. As this Court has observed, ERISA rests delicately atop a system where establishment and maintenance of employee benefit plans are voluntary. *Curtiss-Wright*, 514 U.S. 73, 78. But what employer would create an employee benefit plan if different employees could prevent the plan from being terminated as to them by reason of what they were told years before by the plan administrator?

the decision below would impose and, consequently, have never observed any such rule. No provision of ERISA imposes any such rule, despite its "comprehensive and reticulated" regulatory structure.[3] No regulation of any agency under ERISA imposes any such rule. No administrative ruling or guidance of any sort imposes any such rule.

What ERISA does require is that the plan administrator distribute a "summary plan description" to participants. ERISA secs. 102(a), 104(b), 29 U.S.C. §§ 1022(a), 1024(b).[4] Both the statute and

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[3] "[B]ecause ERISA is a 'comprehensive and reticulated statute,' *Nachman*, 446 U.S., at 361, and is 'enormously complex and detailed,' *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993), it should not be supplemented by extra-textual remedies, such as the common-law doctrines advocated by respondents." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999). Even if one were to look to the common law of trusts for supplementation, however, our research has failed to uncover any analog in the common law for the rule announced by the Third Circuit.

[4] The hierarchy of documents under ERISA as originally enacted was first the plan document, then the "plan description," and finally the "summary plan description." The plan document contains all of the terms of the plan. ERISA sec. 402(a)(1), 29 U.S.C. § 1102(a)(1). The next step down, the "plan description," was a form developed by the Secretary of Labor, denominated Form EBS-1, in which the essential characteristics of the plan were identified. ERISA sec. 104(a)(1)(B) (as originally enacted), 41 FR 16957 (April 23, 1976). Then the bottom rung of the ladder was the "summary plan description."

The requirement of a "plan description" on Form EBS-1 was subsequently repealed by the Taxpayer Relief Act of 1997 (P.L. 105-34, sec. 1503(c)(1), leaving only the plan document and the

(Continued on following page)

the regulations require that the summary plan description include a description of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," which the Department of Labor has always understood as including disclosure of the right to amend or terminate the plan. ERISA sec. 102(b), 29 U.S.C. § 1022(b); 29 C.F.R. § 2520.102-3(l); 63 FR 48378, item 3 (September 9, 1998).[5] This is the mechanism by which ERISA requires that participants be informed of the employer's reserved right to amend the plan, and the mechanism spells out in detail who gets the summary plan description, when, how, and what it contains.[6] *Ibid.*

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summary plan description. By regulation, the summary plan description has subsequently grown in stature and size nearly to equal the plan document, requiring over 4,600 words just to list the required contents. 29 C.F.R. § 2520.102-3.

[5] More than a decade after the events at issue in this case, in November 2000, the U. S. Department of Labor amended the regulation to clarify that the summary plan description must include "a summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan or amend or eliminate benefits under the plan . . . " 29 C.F.R. § 2520.102-3(l); 65 FR 70225 (November 21, 2000).

[6] Besides the affirmative obligation to provide the summary plan description spontaneously to all participants, the plan administrator has an obligation (i) to make the full plan document available at convenient locations and (ii) to provide a written copy of the full plan document to any participant on written request, within 30 days, subject to severe penalties. ERISA secs. 104(b)(2), (4), 29 U.S.C. § 1024(b)(2), (4); ERISA sec. 502(c)(1), 29 U.S.C. § 1132(c)(1). These are alternate mechanisms by which a participant can become informed about a reserved right to amend or terminate.

As a result, plan administrators *do* faithfully include in their summary plan descriptions an explanation of the sponsor's reserved right to terminate or amend the plan but they do *not* make a practice of reminding participants in every oral or written communication that the employer has reserved the right to terminate or amend the plan. A requirement that they do so would affect virtually every employee benefit plan under ERISA because virtually all of them have been repeatedly amended over the years. If those amendments are invalid as to those participants who inquired about their benefits but were never reminded, as part of the response, that the employer reserved the right to amend the plan, the terms of virtually all plans are in doubt, and there are literally millions of them.

"Welfare" plans provide health benefits (including medical, dental, vision and prescription drug), short- and long-term disability, life insurance, supplemental unemployment benefits, and severance pay, among others. ERISA sec. 3(1), 29 U.S.C. § 1002(1). According to the U. S. Department of Labor, in 2000 there were 2.8 million health plans alone, plus another 1.7 million disability plans.[7] (The number of life insurance, supplemental unemployment benefit and severance pay plans is not reported.) In addition, in

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[7] Final regulations on benefit claim procedures, "Economic Costs of the Regulation," at Table 3 (U. S. Department of Labor), 65 FR 70246 (November 21, 2000).

2007 there were nearly 708,000 pension plans.[8] Thus, considerably more than 5 million plans are affected by the decision below.

Moreover, employee benefit plans undergo regular and, in many cases, constant amendments. In health plans, such as the plan at issue, amendments are an annual occurrence, and many of those amendments are adverse to the interests of employees. Any increase in the employee contribution, deductibles or copays is adverse to the interests of employees, yet such amendments are made almost every year in most plans. Plans regularly adjust coverage of particular procedures (such as substance abuse) or particular drugs (such when a generic equivalent becomes available), as well as annual and lifetime maximums. Indeed, the very act of instituting managed care, which has been widely credited with holding down the cost of health care over the past decade, constitutes a plan amendment adverse to the interests of the employees (by limiting reimbursements if they receive care outside the managed care network, for example).

Aside from a relative handful of brand new plans, it is doubtful that there is any employee benefit plan covered by ERISA that has not been amended repeatedly since ERISA. Yet the decision below would

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[8] Private Pension Plan Bulletin, Abstract of 2007 Form 5500 Annual Reports (U. S. Department of Labor, January 2010) at Table A1.

allow employees to permanently "lock in" a lower rate of employee contributions, deductibles and copays, a higher annual or lifetime maximum, or entitlement to full reimbursement even if they received care outside the managed care network, if they were fortunate enough to have asked what the benefit was at some point in the past and been told accurately what it was at that time but were not simultaneously reminded of the employer's right to amend the plan.

Because amendments to welfare plans are annual occurrences and plan administrators have never observed a rule such as the decision below would impose, it is no exaggeration to say that the decision below would affect virtually all welfare plans covered by ERISA, exploding them into mosaics of different benefits frozen in time for different individuals, with most of the differences currently unknown to the plan administrator.[9] It would also resurrect – selectively, based on what different employees may have been told at different times – plans that employers thought they had terminated years ago.

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[9] The effect on pension plans would be less but by no means negligible. For example, ERISA already prohibits defined benefit pension plans from cutting back accrued benefits. ERISA 204(g), 29 U.S.C. § 1054(g). But defined contribution pension plans, such as the 401(k) plans which have largely taken over the pension arena, would still be fully exposed to the effects of the decision below, as shown in the example earlier in the text, where an employer needs to cut back the rate of matching contribution during a period of economic downturn.

C. The Decision Below Contradicts the Purpose of ERISA By Imposing Upon Employers Significant Costs Not Intended By Congress and Will Burden the Federal Courts With a New, Entirely Unnecessary Class of ERISA Litigation.

This Court has recognized time and again the importance of national uniformity under ERISA, based on the supremacy of the written plan document, and has saved plans from efforts to break them up into different pieces in different parts of the country (most often by reason of conflicting state laws), with the resulting administrative costs and burdens. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), *FMC Corp. v. Holliday*, 498 U.S. 52 (1980), *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

The decision below poses the same threat by breaking plans up into myriad sub-plans with different benefits applicable to different employees based on a laborious, fact-intensive investigation into what the employee may have been told by the plan administrator at some time in the past. Whereas ERISA sought to encourage employers to adopt plans by giving them predictability and to streamline the administration of employee benefit plans through national uniformity, the decision below breaks plans up into little pieces – perhaps as small as one

employee – thus exploding the administrative cost and making the benefit cost entirely unpredictable for the employer.

1. With regard to the past, the essence of the problem will be that plan administrators will not know what the terms of their plans are, simply because they will not know which employees were told what at which times in the past. The core of the Congressional scheme under ERISA is the written plan document, which the plan administrator (and any other fiduciary) is duty bound to follow,[10] as this Court explained in detail in *Curtiss-Wright*, 514 U.S. 73, 83-84 (1995). But how does a plan administrator administer a plan according to its written plan document if various amendments to the plan are enforceable in some Circuits but unenforceable in other Circuits against various individual participants for reasons beyond the knowledge of the plan administrator?

This is not an area where the plan administrator can act reasonably and invoke the "arbitrary or

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[10] "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." ERISA sec. 402(a)(1), 29 U.S.C. § 1102(a)(1). "[A] fiduciary shall discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV." ERISA sec. 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

capricious" standard of review; the validity of a plan amendment is a question of law as to which the plan administrator receives no deference. As a result, the plan administrator acts in peril of personal liability for any error in applying the decision below to the history of the plan. Under ERISA, fiduciary liability is personal, not a liability of the plan.

The result will be a flood of claims from employees asserting that they inquired about their benefits but were never told of the employer's reserved right to amend or terminate the plan, such that a given plan amendment may not be enforced against them. The inquiry will be individual and exhausting, even if pursued at the administrative level (using the plan's internal claim and appeal procedures). Even then, plan administrators will be at a loss as to which standard applies – the standard of the Third and Ninth Circuit or the standard of the Fifth, Sixth, Seventh and Eleventh Circuits. Will the outcome depend on where the employee resides or where the plan is administered or some other factor? And will a supposedly uniform national plan then mean different things in different Circuits? What if an employee moves from one Circuit to another – which rule applies?

Given all of these uncertainties, the flood of claims will undoubtedly spill over into the federal courts. Indeed, plan administrators may themselves invoke the jurisdiction of the federal courts under ERISA to bring actions seeking instructions as to what the terms of the plan are, as this Court has

encouraged them to do: "A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

Needless to say, enmeshing the federal courts in individualized inquiries to decide what the terms of all health and welfare plans (and many pension plans) are, as far back as the statute of limitations will reach, represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.[11]

2. For the future, plan administrators will have to decide how to protect themselves against new claims of the type created below, all of them clearly contrary to the purposes of ERISA. For one, plan administrators might simply refuse to answer

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[11] The interstate reach of so many employee benefit plans, combined with the liberal venue and service of process provisions of ERISA, means that the problem cannot be contained within the Third and Ninth Circuits. ERISA effectively permits an action to be brought in any district where the participant resides, on the ground that the breach occurred there; this is all the more true for retirees, as in this case, who may retire to any circuit regardless of where their former employer conducted business. ERISA sec. 502(e)(2), 29 U.S.C. § 1132(e)(2). All it takes is one participant in the Third or Ninth Circuit to institute a class action and toss a nationwide plan into years of turmoil.

questions, instead referring participants to the plan document and summary plan description and deferring any interpretational questions until an actual claim for benefits is presented.

For another – call it the Miranda approach – plan administrators might require all employees who answer questions from participants to conclude the meeting or telephone conversation by reciting from a card that they would carry in their wallets that "All advice given is based on the current terms of the applicable plan. The employer has reserved the right to amend or terminate the plan." For written correspondence, rubber stamps would be made up and the same legend would be stamped on every written communication to a participant in the plan.

Or, like securities brokers dispensing prospectuses, plan administrators might require that all written and oral communications with participants be followed immediately by sending another copy of the summary plan description to the participant (with proof of mailing for protection, naturally). As the expanding regulations over the years have caused summary plan descriptions to grow plump – 50 pages or more is not unusual – printing, postage and handling will become significant expenses. The tiniest slip-up may be costly.

No one could seriously maintain that it is consistent with the intent of Congress in ERISA to force plan administrators to "clam up," or to recite Miranda-type warnings, or to hand out summary

plan descriptions in connection with every written or oral communication with a participant, especially in view of the fact that Congress laid out a "comprehensive and reticulated" system of disclosure of information to employees that does not include any of those measures. Yet, for the future, there is no other way to satisfy the obligation imposed by the decision below.

Put simply, if the terms of virtually all welfare plans (and many pension plans) are presently uncertain without individualized inquiry into which amendments can be applied to which employees, depending on what they were told and when, *plan administrators need to know now*. And, for the future, if their fiduciary duty under ERISA requires the wasteful, duplicative disclosures necessitated by the decision below, *plan administrators need to know now*.

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on

employers, and the time has come to do so again – in a case every bit as compelling as *Curtiss-Wright v. Schoonejongen*. For the reasons set forth above, as well as in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

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